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APPENDIX

TO THE PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 01 203

AUG - 1 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

Melvin E. Blough,

Petitioner

v.

United States of America,
United States Department of the Treasury,
Paul H. O'Neill, Secretary of the Treasury,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Volume C

157 pp

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

Melvin E. Blough

Plaintiff,

Case No. 8:00CV163-T-26E

v.

United States of America,
United States Department of the Treasury
Lawrence Summers, Secretary of the Treasury

Defendants,

COMPLAINT

1. PLAINTIFF:

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511

2. DEFENDANTS:

United States of America
United States Department of the Treasury
Lawrence Summers, Secretary of the Treasury
Building Annex Room 510
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

3. JURISDICTIONAL PLEA:

This Court has jurisdiction over the subject matter of this Complaint which alleges violations of plaintiff's Constitutional rights by the United States government (28 U.S.C. section 1331 (a)).

No administrative remedies were available within the Executive Branch of the United States Government to address plaintiff's allegations. The Judicial, as opposed to the Executive or Legislative Branches of the Federal government, is charged with the duty to interpret the legitimate rights of plaintiff under the Constitution of the United States.

A limited number of the facts presented in this Complaint are also the basis of a civil rights Complaint presented to this Court under the provisions of Title VII of the Civil Rights Act of 1964, as amended (Case No. 98-1358-CIV-T-24E). The conclusions by the Court in the matter of Melvin E. Blough v. Lawrence Summer, Secretary of the Treasury; are currently under appeal to the United States Court of Appeals for the Eleventh Circuit (Case No. 99-13735-FF).

The Court did fail to address the specific allegations of Constitutional rights violations which were presented as an amendment to the above referenced Complaint of civil rights violations. "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today" Washington v. Davis, 96 S. Ct. 2040 (1976). **This Court has not addressed the merits in this Complaint under the "constitutional standards" required by the United States Supreme Court in**

Washington v. Davis, supra.

Plaintiff deems it necessary to initiate this Complaint to preserve the facts within the statute of limitations and address the silence of this Court which has placed a cloud over the legal remedies available to Plaintiff in this claim of constitutional tort against the United States Government.

The following observation by Justice Harlan was paraphrased in *Davis v. Passman,* 99 S. Ct. 2264 (1979) wherein the United States Supreme Court found that unconstitutional federal employment discrimination is deemed actionable in the Federal Courts based upon a claim directed to the due process clause of the Fifth Amendment:

> "Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles" Bivens v. Six Unknown Named Agents Of Fed. Bur. Of Narc, 91 S. Ct. 1999 (1971).

4. ALLEGATION:

The United States of America did violate Plaintiff's Constitutional right as a totally and permanently disabled veteran to be secure in a fundamental and protected Fifth Amendment liberty interest. The violations did manifest as continuous acts of

employment related threats of physical injury, harassment and retaliation over a nine year period.

5. FACTS IN SUPPORT OF ALLEGATION:

Plaintiff is one of approximately fifty-one thousand combat disabled veterans recognized as totally and permanently disabled by the Department of Veterans Affairs. Plaintiff has two artificial legs and loss of use of one hand as a result of service in Vietnam. The United States of America has since 1970 accepted full responsibility and liability for the aforementioned status of Plaintiff.

Plaintiff has been employed by the United States Department of the Treasury (Internal Revenue Service) since 1979 as an Internal Revenue Agent and has never been the subject of disciplinary action by the employer. In 1989 Plaintiff was promoted to a grade 13 Internal Revenue Agent and has consistently to this date received outstanding annual performance evaluations and a variety of performance awards from the Department of Justice and the National/Divisional Offices of the Internal Revenue Service.

The genesis of the Complaint occurred in 1991 and did precipitate a chain reaction of threatening and retaliatory actions against Plaintiff which continue to the present.

On September 23, 1991 Internal Revenue Service (IRS) Group Manager Ron Prowler (Prowler) did put his fist in Plaintiff's face and back Plaintiff against a row of file cabinets when Plaintiff refused his request for a listing of confidential informants which had been developed by Plaintiff in a very sensitive examination and whose safety was of concern to Plaintiff. The abusive conduct of Prowler

has been confirmed by the sworn testimony of IRS Agent Gary Maxwell. The threat of physical injury was reported to Division Chief Terry Hailihan in a memorandum dated September 23, 1991. The employer did not investigate the threat and no disciplinary actions were taken against Prowler. Plaintiff had no further contact with Prowler as Prowler had been assigned to another group prior to the September 23, 1991 threat.

Prowler's replacement as group manager (Melanie Clark) was a good friend of Prowler's having worked together in Miami. Ms. Clark's attitude toward Plaintiff changed after the September 23, 1991 threat by Prowler and she harassed Plaintiff on multiple occasions until her forced resignation as group manager in December 1993 (harassing another agent in the group). On October 14, 1993 Plaintiff did file a complaint of employment discrimination against Prowler and Clark which referenced the 1991 threat by Prowler. The complaint was withdrawn in December 1993 upon the resignation of Clark. Plaintiff incorrectly assumed that Prowler wouldn't be able to get to him once Clark was gone.

During the years 1992 and 1993 Plaintiff was assigned very small grade 13 examinations by Clark (i.e. minimum gross receipts and assets). No large and complex examinations were assigned to Plaintiff.

On September 18, 1995 Plaintiff notified (verbally and in writing) the new Division Chief (Pat Cox) of the previous threat by Prowler and requested that Prowler not be assigned supervisory authority over Plaintiff.

On September 21, 1995 Prowler met with Plaintiff's

(then) current manager (Genny Farley) and went into a long dissertation on how much he hated Plaintiff and stated "he would push (Plaintiff) down a flight of stairs if he thought he could get away with it". Ms. Farley was concerned as to the safety of Plaintiff and immediately informed Plaintiff of the threat. The threat by Prowler has been confirmed by the sworn testimony of Genny Farley. Ms. Farley also stated that she personally informed Division Chief Pat Cox of the threat against Plaintiff by Prowler and sworn testimony by Pat Cox provides confirmation as to said notification.

Plaintiff called the IRS Inspection Service upon being notified of the threat by Prowler and was informed that nothing could be done unless Prowler assaulted Plaintiff. The IRS Inspection Service did then prepare and forward a memorandum to the District Director regarding the reported threat by Prowler. The employer did not investigate the threat and no disciplinary actions were taken against Prowler. Plaintiff was not required to work for Prowler and was assigned to a group manager with no allegiance to Prowler until October 1, 1997.

On December 19, 1995 Plaintiff filed a discrimination complaint under 29 CFR PART 1614 with the United States Department of the Treasury (employer) complaining of the September 21, 1995 threat of physical injury be Prowler. Plaintiff's complaint was not accepted for investigation by the employer and the Equal Employment Opportunity Commission subsequently affirmed the rejection of the complaint on the following basis -

> "a complainant must point to an 'injury in fact' in order to be aggrieved. Simple conjecture as to alleged future injury is not sufficient"

The United States Government has taken the position that the threats by Prowler did not provide injury to Plaintiff or violate Plaintiff's rights. It was necessary that Prowler physically injure Plaintiff before Plaintiff's rights were deemed to have been violated under the stated position of the United States Government.

The threats by Prowler against Plaintiff in 1991 and 1995 were taken seriously by Plaintiff, having experienced his rage first-hand. The threats by Prowler were physical (inflict pain) as opposed to administrative (demotion, suspension, etc.). The threats were directed to Plaintiff's most vulnerable characteristic (i.e. disability). According to the Penalty Guidelines in the Handbook of Employee Conduct and Ethical Behavior, Prowler should have been reprimanded for the 1991 threat and dismissed for the 1995 threat; however given the culture which existed then and continues to exist within IRS management, he was protected and promoted. The threats by Prowler and the harassment/retaliation by IRS management persons has taken a toll upon Plaintiff both mentally and physically since 1991. Plaintiff continues to fear the violent nature of Prowler and the vindictive nature of IRS management.

From October 1, 1997 to the present Plaintiff has been working under the direction and control of Group Manager Teresita M. Rodriguez. In anticipation of becoming the manager of the group conducting examinations of the largest and most complex tax-exempt organizations in Florida (Coordinated Examination Program or "CEP" examinations), Prowler did recruit and promote the selection of Ms. Rodriguez to fill the group manager position he was about to vacate.

Ms. Rodriguez was a good friend of Prowler's having worked together in Miami. Ms Rodriguez did harass Plaintiff on multiple occasions during her tenure as Group Manager and did work in conjunction with IRS management persons to restrict the examinations assigned to Plaintiff, to those examinations below Plaintiff's working grade level during the period October 1, 1997 through March 7, Ms. Rodriguez did also subject all examinations completed by Plaintiff to one hundred percent review upon closing. This action was taken immediately after Plaintiff filed the Complaint of civil rights violations with this Court. The IRS agent assigned to review Plaintiff's closed examinations refused to be a party to such disparate treatment in view of the fact less than three percent of closed examinations are randomly selected for review.

On November 18, 1997 Plaintiff was informed in writing by the Division Chief (Pat Cox) that the only way Plaintiff would be permitted to continue conducting examinations of the largest and most complex entities (i.e. CEP examinations) was to make application to work for Prowler. The authors of the November 18, 1997 memorandum (Division Chief Cox and Assistant Division Chief Breslin) were not uninformed management persons, but rather informed decisionmakers who were personally informed by Plaintiff and Group Manager Genny Farley of the 1991 and 1995 threats against Plaintiff by Prowler. Immediately prior to the issuance of the November 18, 1997 memorandum; the authors were also informed by EEO Counselor Ginger King that Plaintiff would not work for Prowler due to the prior threats. The memorandum of November 18, 1997 was devastating to Plaintiff in that it was an affirmation (approval) by informed IRS management persons/decisionmakers Cox and

Breslin of the prior physical threats by Prowler against Plaintiff.

On November 18, 1997 Plaintiff did file a third discrimination complaint with the United States Department of the Treasury under 29 CFR PART 1614 based upon a claim of retaliation by IRS management for the December 19, 1995 complaint filed with the United States Department of the Treasury and the Equal Employment Opportunity Commission.

The November 18, 1997 complaint (retaliation) was directly and transactionally related to the December 19, 1995 complaint in that Internal Revenue Service management ignored and accepted the threats by Prowler against Plaintiff and then maliciously required Plaintiff to work under the supervision of Prowler if he wished to conduct the same types of examinations which he had conducted under the supervision of other managers during the period February 1989 through September 1997 (with the exception of 1992 and 1993 when Plaintiff was under the supervision of Melanie Clark).

The United States Government Department of the Treasury failed to timely bring final action on the complaint of November 18, 1997 (retaliation) and Plaintiff did on June 29, 1998 initiate civil action with this Court as provided in 42 U.S.C. 2000e-16 (c). The United State Department of the Treasury has acknowledged that during the nine year period October 1, 1988 through September 30, 1997 sixty-three percent (63%) of Plaintiff's examination time was devoted to six (6) CEP examinations (largest and most complex) and thirty-one percent (31%) to Grade 13 non-CEP examinations. The annual gross receipts did range from $400 million

to $1 billion (with exception for the years 1992 and 1993). The United States Department of the Treasury has also acknowledged that during the period October 1, 1997 through March 7, 1999 the average gross receipts of those tax returns assigned to Plaintiff was $5 million. The large case examination assigned to Plaintiff on March 8, 1999 continues to this date and is consistent in duration to other large case examinations conducted by Plaintiff. In sworn testimony Division Chief Cox did acknowledge that he provided instruction to Group Manager Rodriguez and others regarding the assignment of work to Plaintiff subsequent to October 1, 1997. Division Chief Cox also acknowledged that the tax returns assigned to Plaintiff were below his working grade level during the period October 1, 1997 through March 7, 1999.

Plaintiff has been harassed and retaliated against for reporting the threats by Prowler. Said conduct is consistent with the findings of the Senate Finance Committees relative to the IRS. The abusive culture which exists within management at the IRS is documented in the following testimony. These were not disgruntled employees, but rather Departmental witnesses acknowledging the abusive practices of IRS management at Hearings Before the Committee on Finance United States Senate (April 28, 1998):

Mr. Richard Calahan (Deputy Inspector General, Office of the Inspector General Department of the Treasury) -

> "I.R.S. management appears to treat managers differently than employee when it pertains to disciplinary actions".

Yvonne D. DesJardins (Chief, Employee and Labor Relations Section, Personnel Branch, Internal Revenue Service) -

> "I can only speak from my personal experiences and observations since working for the I.R.S. Unfortunately, a good portion of what I have observed leaves much to be desired when it comes to consistent treatment of individuals regarding discipline and the manner in which the I.R.S. deals with whistleblowers.
>
> The whistleblowers are ostracized and careers destroyed, and those senior officials who engaged in the misconduct which was reported and substantiated are not only protected from receiving any disciplinary actions, but are oftentimes rewarded during the same year the misconduct occurs. Again, I speak from personal experience."

The following government publications are replete with sworn testimony regarding the abusive management culture which has and continues to exist within the Internal Revenue Service:

1. HEARINGS BEFORE THE SUBCOMMITTEE ON THE CIVIL SERVICE OF THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT HOUSE OF REPRESENTATIVES (September 10 and 25, 1997).

2. HEARINGS BEFORE THE COMMITTEE ON FINANCE UNITED STATES SENATE ON H.R. 2676 (January 28,29; February 5, 11, 25, 1998 and April 28, 29, 30 and May 1, 1998).

The Commissioner's Semi-Annual Disciplinary Actions Report 1996 -1999 demonstrates the inequities in the application of disciplinary actions against employees versus IRS management persons. Each case number represents an "alert" and the number of reported cases are in excess of three thousand (3,000). The United States Department of the Treasury has stated that Prowler has three "alerts" on record and none of the three "alerts" was initiated with regard to the threats against Plaintiff.

6. RELIEF:

The United States Supreme Court did observe in *Chas. C. Steward Mach. Co. v. Davis,57 S. Ct. 883(1937)* "that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment".

The first time I felt handicapped after Vietnam was on September 23, 1991 when Group Manager Prowler put his fist in my face and backed me against those file cabinets. He took something special away from me that day and in doing so violated my rights under the Fifth Amendment. The United States Government was notified and chose to ignore the violation.

The written response by the Department of the Treasury and the Equal Employment Opportunity Commission to the September 21, 1995 threat by Group Manager Prowler to "push me down a flight of stair if he thought he could get away with it" was that he didn't follow through on the threat and therefore no harm was done. Again my Fifth Amendment rights were violated with the concurrence of the United States Government.

The threats of physical injury to me by Group Manager Prowler were ignored in that Prowler was part of an abusive management culture which did in fact condone his actions and retaliate against me for reporting the threats. I have endured nine years of threats, harassment and retaliation as an employee of the Federal government. I realize that it is not the individuals (Ron Prowler, Pat Cox, Peter Breslin, Terry Rodriquez , Mike Rachael, etc.) that are to blame, but rather the United States Government which by its actions and inactions has encouraged said abuse.

The conduct of the United States Government is conscious shocking in the Constitutional sense and the remedy should be commensurate. That the United States Government, as the employer, would create and condone a work environment in which a totally and permanently disabled veteran is threatened with physical injury on multiple occasions and then retaliated against and harassed for reporting the threats is equivalent to confiscation of that persons liberty interest and subject under the Fifth Amendment to challenge and annulment.

WHEREFORE, compensatory damages in the amount of ten million dollars ($10,000,000) are sought and trial by jury is requested.

"S/Melvin E. Blough" pro se

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803 Tomahawk Trail
Brandon, FL 33511
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MELVIN E. BLOUGH

Plaintiff,

Case No. 8:00CV1631-T-26E

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF THE TREASURY, LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendants.

_____/

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS PROVIDED UNDER COURT ORDER OF OCTOBER 17, 2000.

Plaintiff, Melvin E. Blough, hereby moves for denial of summary judgment under Fed. R. Civ. P. 56 on grounds that this is not a *Bevins* action, the doctrine of res judicata does not apply, and Plaintiff is not barred from initiating a cause of action under the Fifth Amendment to the United States Constitution. In

support hereof, plaintiff respectfully presents the following:

MEMORANDUM OF LAW

I. INTRODUCTION

This is a claim for damages against the United States Government/Department of the Treasury for deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution.

II. FACTS

The facts as presented are limited to those necessary to address the instant motion for summary judgment.

RES JUDICATA

The complaint initially filed with this court in 1998 did encompass a claim of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended (Document No. 1). Plaintiff did timely file motions to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (Documents No. 33, 36, 49, 54, 106), and a claim of constitutional tort against the United States Government (Documents No. 97, 99, 104). This court did concurrently grant Defendants motion for summary judgment in the complaints of Civil Rights and Rehabilitation Act violations; however failed to take judicial notice of the timely filed motion to amend the initial complaint (under the provisions of Rule 15(a) of the Federal Rules of Civil Procedure) to

include a claim of constitutional tort by the United States Government (Documents No. 97, 99, 104).

Neither the district court nor the appellate court have ruled on the merits of this complaint of constitutional tort (Exhibit C) which was properly filed in conjunction with the initial complaint (Document No. 1). This fact is evident upon review of the Order by the district court (Document No. 111) and the appellate court (Exhibit B) in that said decisions were limited to the alleged violations under Title VII of the Civil Rights Act of 1964, as amended, (Document No. 1) and the motion to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (Documents No. 33, 36, 49, 54, 106). The Order by the district court (Document No. 111 page 8) specifically states "Plaintiff's Motion to Amend Complaint (Doc. No. 33) is denied for the reasons set forth in this Order".

A claim of deprivation of a protected Fifth Amendment liberty interest by the Defendant was raised by Plaintiff during the course of a preliminary injunction hearing (Document No. 32 pages 8, 9,17).

The following statements were presented in plaintiff's motion for leave to amend the initial complaint (Document No. 97 page 2) under rule 15(a):

"Plaintiff has met the "relation back" doctrine under Rule 15(c)(2) of the Federal Rules of Civil Procedure in that the initial Complaint did reference the fear experienced by Plaintiff and threats, harassment and retaliation directed to Plaintiff by agents of Defendant since 1991."

"The essence of Plaintiff's initial complaint under Title VII is that he has been subject to a continuing series of threats, harassment, intimidation and

retaliation as a pretext for adverse action over an eight year period. Said actions are also the basis in this Fifth Amendment claim."

The court did by Order dated August 30, 1999 permit Plaintiff to submit a memorandum in support of the motion to amend the initial complaint to bring action under the Rehabilitation Act of 1973 (Documents No. 102, 106); however was silent as to Plaintiff's motion of August 9, 1999 to amend the initial complaint to include a clai mof constitutional tort (Documents No. 97, 99, 104).

The following statements were presented in Plaintiff's response to Defendant's motion for summary judgment (Document No. 107 pages 2 and 22):

> "Two motions are pending before the Court to amend the initial Complaint of employment related discrimination under Title VII of the Civil Rights Act of 1964. The facts presented in this Complaint are so egregious such as to violate multiple statutes and the Constitution itself. It would be inappropriate for the Court to consider this motion for summary judgment which is limited to a single claim within a multi-facet Complaint."
>
> "Upon completion of the amending process the Complaint will incorporate the following courses of action (claims) which utilize three different routes to reach the ultimate conclusion of discrimination. **The facts are consistent with each route; however the law and remedies differ** (emphasis added).
>
> 1. Deprivation of a fundamental and protected liberty interest which exists

within the Fifth Amendment to the United States Constitution.

2. Unlawful intentional discrimination which is prohibited under Title VII, sections 704 and 717 of the Civil Rights Act of 1964, as amended.

3. Unlawful intentional discrimination which is prohibited under the Rehabilitation Act of 1973, as amended.

The same parties are presented in this complaint of constitutional tort and A) the initial complaint alleging violations under Title VII of the Civil Rights Act of 1964, as amended, B) the motion to amend the initial complaint to include the Rehabilitation Act of 1973, and C) the motion to amend the initial complaint to include a claim of constitutional tort against the United States Government. This complaint of constitutional tort arose out of the same nucleus of conduct, transactions and occurrences set forth in A) the initial complaint of discrimination under Title VII of the Civil Rights Act of 1964, as amended, B) the motion to amend the initial complaint to include the Rehabilitation Act of 1973, and C) the motion to amend the initial complaint to include a claim of constitutional tort against the United States Government.

STATUS OF PLAINTIFF PROVIDING FOR CONSTITUTIONALLYPROTECTED LIBERTY INTEREST

Plaintiff is one of approximately fifty-one thousand combat disabled veterans recognized as totally and permanently disabled by the Department of Veterans Affairs (source: Department of Veterans Affairs FY 1998 Annual Report). Plaintiff has two artificial legs

and loss of use of one hand as a result of service in Vietnam (Document No. 25 exhibit I). The United States Government has since 1970 accepted full responsibility and liability for the aforementioned status of Plaintiff.

Plaintiff has been employed by the United States Government/Department of the Treasury since 1979 as an Internal Revenue Agent. Plaintiff has never been the subject of disciplinary action by the employer and has consistently to this date received outstanding annual performance evaluations (Document No. 25 exhibit A).

III. APPLICABLE LEGAL STANDARDS

A. Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment where the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc. 106 S. Ct 2505, 2510 (1986).

The moving party has the burden to establish the absence of a genuine issue as to any material fact. Tyson Foods, Inc., 121 F.3d at 646 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970)). The moving party may discharge this burden by "showing' - tha tis, pointing out to the District Court - tha t here is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2554 (1986). In deciding whether the burden has been satisfied, this Honorable Court must view the evidence and all reasonable inferences arising from it in the light most favorable to the nonmoving

party. Tyson Foods, Inc., 121 F.3d at 646 (citing Adickes, 398 U.S. at 157).

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 94 S. Ct. 1683 (1974).

B. Res judicata

"Judgment on merits is conclusive, and bars subsequent action between same parties on the same question, claim, or demand, and also concludes parties on different claim or demand which involves same question as litigated in original action". United States v. Moser, 45 S. Ct. 66 (1924).

"A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ...." *Southern Pacific R. Co. v. United States*, 18 S. Ct. 18 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same

cause of action. *Cromwell v. County of Sac*, 94 U.S. 351 (1877). Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. *Southern Pacific R. Co., supra*, 18 S. Ct., at 27. **To preclude parties from contesting matters that they have had a full and fair opportunity to litigate** (emphasis added) protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. U.S., 99 S. Ct. 970 (1979).

"**The purpose behind the doctrine of res judicata is that the 'full and fair opportunity to litigate** (emphasis added) protects [a party's] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial actions by minimizing the possibility of inconsistent decisions.' Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999) (quoting Montana, supra). Res judicata bars the filing of claims which were raised or could have been raised in an earlier proceeding. *Citibank, N.A. V. Data Lease Financial Corp.*, 904 F.2d 1498 (11th Cir. 1990).

"Under Eleventh Circuit precedent, a claim will be barred by prior litigation if all four of the following elements are present: (1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases." Ragsdale, supra at 1238.

"In the Eleventh Circuit, '[t]he principal test for determining whether the causes of action are the

same is whether the primary right and duty are the same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form'. 'It is now said, **in general** (emphasis added), that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as the former action, that the two cases are really the same 'claim or cause of action' for purposes of res judicata". Ragsdale, 193 F.3d at 1239 (quoting Citibank, supra).

"We must [therefore] look to the factual issues to be resolved [in Rubbermaid II], and compare them with the issues explored in Rubbermaid I. *Id.* Did they arise out of the same transaction or series of transactions? Could Miller have brought his retaliation claim when he brought his *qui tam* claim?" Ragsdale, 193 F3d. at 1239.

The Supreme Court, Mr. Justice White, held that standards applicable to equal employment opportunity cases should not have been applied in resolving issue whether the test violated due process clause of the Fifth Amendment. Washington v. Davis, 96 S. Ct. 2040 (**Decided June 7, 1976).**

"We are of the opinion that the amendment was properly permitted. Rule 15(c) of the Federal Rules of Civil Procedure ... provides that 'Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Tiller v. Atlantic Coast Line R. Co., 65 S. Ct. 421, 424 (1945). "The grant or denial of an opportunity to amend pleadings pursuant to Federal Civil Procedure Rule 15(a) is within the discretion of the Federal District Court, but outright refusal to grant leave without any justifying reason appearing for

the denial is not an exercise of discretion, and is merely abuse of discretion and is inconsistent with the spirit of the Federal Rules." Foman v. Davis, 83 S. Ct. at 224 (1962).

"In general a case becomes moot 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" Murphy v. Hunt, 102 S. Ct. at 1183 (1982) (quoting United States Parole Comm'n v. Geraghty, 100 S. Ct. at 1208 (1980). "The defendant is free to return to his old ways. This together with the public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right." United States v. W. T. Grant Co., 73 S. Ct. 894, 897 (1953). "The District Court *cannot*, in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of section 1291. But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. Sears, Roebuck and Co. v. MacKey, 76 S. Ct. 895, 900 (1956).

C. Federal Question

1. United States/United States Department of the Treasury as party defendant.

The test of whether an action is against an officer individually or against the United States is not the denomination of the party by the plaintiff, but whether relief sought is against the United States. Larson v. Domestic & Foreign Commerce Corporation, 69 S. Ct. 1457 (1949).

"It is argued that the principal of sovereign immunity is an archaic hang-over not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend (citing Brooks v. United States, 69 S. Ct. 918). But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for the wrong done to him by the Government. It is far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act." Larson, 69 S. Ct. at 1468.

"Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. Larson, 69 S. Ct. at 1468.

Interpretation of the same words in different statutes may vary with the consequences, for such consequences may provide insight for determination of congressional purpose. "We brought the case here on certiorari because of its importance as an interpretation of the Act. It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed." Brooks v, United States, 69 S. Ct. 918 (1949).

2. Section 717 of Title VII of the Civil Rights Act of 1964, as amended.

"The primary question in this litigation is not difficult to state: Is section 717 of the Civil Rights Act

of 1964, as added by section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. section 2000e-16 the exclusive individual remedy available to a federal employee complaining of job-related discrimination? But the question is easier to state than it is to resolve. Congress simply failed explicitly to describe section 717's position in the constellation of antidiscrimination law. We must, therefor, infer congressional intent in less obvious ways. Brown v. General Services Administration, 96 S. Ct. 1961 (**Decided June 1, 1976).**

Federal employment discrimination clearly violated the Constitution before passage of the 1972 Act. Brown v. General Services Administration, 96 S. Ct. at 1964 (citing *Bolling v. Sharpe*, 74 S. Ct. 693 (1954).

"Section 717(a) provides that all **personnel actions** (emphasis added) affecting federal employees and applicants for federal employment 'shall be made free from any discrimination based on race, color, religion, sex, or national origin.'" Brown v. General Services Administration, 96 S. Ct. at 1966.

"The petitioner relies upon our decision in *Johnson v. Railway Express Agency*, 95 S. Ct. 1716 (1975), for the proposition that Title VII did not repeal pre-existing remedies for employment discrimination. In *Johnson* the Court held that in the context of *private employment* Title VII did not pre-empt other remedies. But that decision is inapposite here. In the first place, there were no problems of sovereign immunity in the context of the *Johnson* case. Second, the holding in *Johnson* rested upon **the explicit legislative history of the 1964 Act which "' manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and**

federal statutes.'" (emphasis added) 95 S. Ct. at 1719 quoting *Alexander v. Gardner-Denver Co.*, 94 S. Ct. 1011, 1019-20. **There is no such legislative history behind the 1972 amendments.** (emphasis added). Indeed, as indicated above, the congressional understanding was precisely to the contrary. Brown v. General Services Administration, 96 S. Ct. at 1968.

"In the case at bar, as in *Preiser* and the other cases cited above, the established principal leads unerringly to the conclusion that section 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Services Administration, 96 S. Ct. at 1969.

"Because we conclude that section 717 bars reprisals against federal employees who file charges of discrimination, appellant must bring her action under that section." Porter v. Adams, 639 F.2d 273 (U.S.C.A 5th Cir. 3/13/81) (citing Brown v. GSA, 96 S. Ct. at 1969).

"Like the plaintiffs in *Bolling v. Sharp*, supra, petitioner rests her claim directly on the Due Process Clause of the Fifth Amendment. There is in this case 'no *explicit* congressional declaration that persons' in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury." Davis v. Passman, 99 S. Ct. 2264, 2276, 2278 (1979) (citing Bivens v. Six Unknown Federal Narcotics Agents, 91 S. Ct. 1999 (1971)). **"On the contrary, section 717 leaves undisturbed whatever remedies petitioner might otherwise possess."** (emphasis added) Davis v. Passman, 96 S. Ct. at 2278.

3. Section 712 of Title VII of the Civil Rights Act of 1964.

"Nothing contained in this title shall be construed to repeal or modify any **Federal,** State, territorial, or local **law creating special rights** or preference **for veterans**. (emphasis added). Public Law 88-352, July 2, 1964 ("Civil Rights Act of 1964").

"We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibilities in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provision of the whole law, and to its object and policy." Richards v. United States, 82 S. Ct. 585, 591 (1962).

The following statements by Senator McCarthy appear in the Congressional Record June 19, 1964 in regard to the Civil Rights Act of 1964:

> "The search for freedom and for a world in which freedom and equality can be enjoyed has been a preoccupation of civilized people throughout the history of the world. Certainly, it has been a preoccupation of Americans since this country was first settled. One man has said: once we have declared for liberty and for freedom and for equality, we have declared for an unending war in an unending revolution. Certainly, we in the United States have declared more often, more consistently and more loudly, for equality, for liberty and freedom; and consequently, we must bear the burden of that revolution and give the example.
>
> These rights were claimed on the basis of the nature of man and the nature of a person. All of

> these rights to which we now refer today, on another occasion were declared to be the inalienable rights of all men. These civil rights do not derive because of law but, rather, derive from the very nature of man himself. They have their basis and they rest in that nature. We have made these basic human rights civil rights, and we have sought to guarantee and protect them through the Constitution of the United States and of the States, and through the laws of the land."

The equal employment provisions of the Civil Rights Act were designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. Alexander v. Gardner-Denver Co., 94 S. Ct. 1011 (1974). "Generally, a law will survive scrutiny under the equal protection clause if the distinction rationally furthers a legitimate state purpose." Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985).

"We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" Connecticut Nat. Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (citing Rubin v. United States, 101 S. Ct. 698,701 (1981).

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' Ginsberg & Sons v. Popkin, 52 S. Ct. 322." Fourco Glass Co. v. Transmirra Products Corp., 77 S. Ct. 787, 791 (1957).

4. Protected liberty interest under the Fifth Amendment to the United States Constitution.

"Due Process Claim. The government may not deprive any person of 'life, liberty or property without due process of law.' U.S. Const. amend. To prevail upon its procedural due process claim, BJC must establish: (1) **a constitutionally protected interest in life, liberty or property** (emphasis added); (2) government deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation." Bank of Jackson County v. Cherry, 980 F.2d 1362 (11th Cir. 1993) (citing Lehr v. Robertson, 103 S. Ct. 2985,2990 (1983).

"A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of the **purely legal question** (emphasis added) permits courts expeditiously to weed out suits which fail the test." Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991).

"Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and], solid recognition of the basic values that underlie our society. Moore v. City of East Cleveland, Ohio, 97 S. Ct. 1932, 1937 (1977) (citing Griswold v. Connecticut, 85 S. Ct. at 1691.

"The right is fundamental 'because preservative of all rights.'" Harman v. Forssenius, 85 S. Ct. 1177, 1183 (1965) (citing Yick Wo v. Hopkins, 6 S. Ct. 1064).

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." Bolling v. Sharpe, 74 S. Ct. 693 (1954).

"Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' *id.*, 97 S. Ct. at 1938; *Snyder v. Massachusetts,* 54 s. Ct. 330 (1934) ('so rooted in the traditions and conscience of our people as to be ranked as fundamental'), and 'implicit in the concept of ordered liberty', such that 'neither liberty nor justice would exist if they were sacrificed,' *Palko v. Connecticut,* 58 S. Ct. 149 (1937). Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' Collins, 112 S. Ct. at 1068, that direct and restrain our exposition of the Due Process Clause. Washington v. Glucksberg, 117 S. Ct. 2258, 2269 (1997).

"Discrimination may be so unjustifiable as to be violative of due process." United States v. Gilman, 74 S. Ct. 695 (1954) (citing Detroit Bank v. United States, 63 S. Ct. 297; Currin v. Wallace, 59 S. Ct. 379; Steward Machine Co. v. Davis, 57 S. Ct. 883). "It is only invidious discrimination which offends the Constitution". Ferguson v. Skrupa, 372 U.S. 726 (1963).

The due process clause of the Fifth Amendment contains an equal protection component prohibiting the United States government from invidious discrimination. Washington v. Davis, 96 S. Ct. 2040 (1976). Unconstitutional federal employment discrimination was deemed actionable in the Federal Courts based upon a claim directed to the due process clause of the Fifth Amendment. Davis v. Passman, 99 S. Ct. 2264 (1979).

"The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' *Meyer v. Nebraska*, 43 S. Ct. 625 (1889). Among the historic liberties so protected was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security." Ingraham v. Wright, 97 S. Ct. 1401, 1413 (1977).

"The veterans' expectation of process was justifiable. This justifiable and objective expectation, like that held by the prisioners in *Vitek* and *Wolff*, rises to the level of a constitutionally protected liberty interest and requires appropriate process in the determination that the statutory criteria for transferring the veterans are met." United States v. Stead, 740 F.2d 657 (8th Cir.1984).

IV. ARGUMENT

Defendant's motion for summary judgment is based upon the following assertions:

1. Plaintiff seeks damages under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

2. This action is barred by the doctrine of res judicata.

3. Title VII of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of discrimination in federal employment (citing Brown v. General Services Administration, 96 S. Ct. 1961 (1976)) and Plaintiff is therefore barred from initiating a cause of action under the Fifth Amendment to the United States Constitution.

THIS IS NOT A *BEVINS* ACTION AGAINST THE UNITED STATES GOVERNMENT:

At page two of the instant motion, Defendant paraphrases the complaint and acknowledges Defendant to be the United States Government as opposed to individual agents of the United States Government. Defendant then presents a series of arguments negating *Bevins* claims against the United States Government.

Liability rests with the United States Government/ Department of the Treasury in that the individual agents of the United States Government were acting within the scope of their authority. The following statement was presented within Plaintiff's motion to amend the initial complaint (Document No. 104 page 2) alleging violations of the Civil Rights Act of 1964 and is repeated at page nine of the complaint currently before this court:

> "Internal Revenue Service management persons (Prowler, Cox, Breslin, Clark, Rachael, Rodrigueq, etc.) did perform their assigned duties within the abusive management culture of the Internal Revenue Service which not only condoned; but also rewarded the threats, intimidation, harassment and retaliation which Plaintiff was subject to over a eight year period. Liability/responsibility for said abuse rests with the Defendant, not the individuals."

This is not a suit for damages directed to individual agents of the United States Government alleging violations of plaintiff's constitutional rights under color of federal authority. It is not the basis in this complaint that individual employees of the United States Government violated Plaintiff's constitutional rights by adverse personnel actions as specified in 5 CFR Ch. 1 Subpart D section 752.401(a) or engaged in prohibited personnel practices under Title 5, Chapter 23, section 2302 USC.

This is a suit for damages directed to the United States Government/Department of the Treasury alleging violation of Plaintiff's constitutional rights by **governmental actions** of the United States Government/Department of the Treasury. Larson, 69 S. Ct. at 1457. It is the basis in this complaint that Plaintiff, as a totally and permanently disabled veteran, has a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government. Plaintiff's constitutional rights are protected against said **governmental action** and it is proper that the courts have the power to grant relief against those actions. Larson, 69 S. Ct. at 1468.

THIS ACTION IS NOT BARRED BY THE DOCTRINE OF RES JUDICATA:

The following statement was presented by Plaintiff at page two of the complaint of constitutional rights violations currently before this court:

"The Court did fail to address the specific allegations of Constitutional rights violations which **were presented as an amendment** to the above referenced Complaint of civil rights violations. 'We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today' Washington v. Davis, 96 S. Ct. 2040 (1976). **This Court has not addressed the merits in this Complaint under the 'constitutional standards' required by the United States Supreme Court in** *Washington v. Davis, supra.*"

The following statement was presented by Defendant at page six of the instant motion:

"Like the plaintiff in Ragsdale, Plaintiff should not be afforded a 'second bite at the apple' to assert now - afte rthe dismissal of his first case - tha this allegations of employment discrimination also violate the Fifth Amendment to the United States Constitution."

The decisions in Montana v. United States, 99 S. Ct. 970 (1979) and Ragsdale v. Rubbermaid , Inc., 193 F.3d 1235 (11th Cir. 1999) were based upon the premise, before any other considerations, that the relevant party has **"had a full and fair opportunity to litigate."** The facts and documentation as presented in this response to Defendant's motion for summary judgment clearly reflect the fact that Plaintiff **was**

denied the opportunity to litigate the alleged constitutional rights violation presented in the prior litigation.. The court did fail to take judicial notice of the motions to amend the initial civil rights complaint to include a claim of constitutional tort.

The court and the Defendant were advised of the claim of constitutional tort during the course of the preliminary injunction hearing (Document No. 32 pages 8, 9, 17), by motion to amend (Documents No. 97, 99, 104) which was properly and timely filed with the court three weeks before the court permitted Plaintiff to amend the initial complaint to bring action under the Rehabilitation Act of 1973 (Document No. 102, 106), and in Plaintiff's response to Defendant's motion for summary judgment (Document No. 107 pages 2 and 22).

The Order of the court granting Defendant's motion for summary judgment (Document No. 111 page 8) does address the amendment to the initial complaint to bring action under the Rehabilitation Act of 1973; however is silent as to the motion to amend for constitutional tort. The silence of the court is attributed to an administrative oversight for "outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion, and is merely abuse of discretion and is inconsistent with the spirit of the Federal Rules". Foman v. Davis, 83 S. Ct. at 224 (1962). Plaintiff did attempt to revive, at the appellate court level, the amendment to claim of constitutional tort; however the appellate court also failed to provide comment.

The United States Supreme Court did recognize in Washington v. Davis, 96 S. Ct. 2040 (1976) that the judicial standards applicable to equal employment opportunity cases should not be applied in resolving issues under the due process clause of the Fifth

Amendment. Washington v. Davis, supra. was decided six days after Brown v. General Services Administration, 96 S. Ct. 1961 (1976) indicating the Supreme Court had reviewed the judicial standards required in Title VII versus Fifth Amendment claims.

The court did rule in the prior litigation upon the motion to amend the initial complaint to bring action under the Rehabilitation Act of 1973 in that the determination was consistent with the decision in the alleged violation under Title VII (Document No. 111 page 4) (i.e. the judicial standards for review were compatible). A final decision on the motion to amend the initial complaint to include a claim of constitutional tort was not addressed by the court in that; although discovery was complete and the proposed amendment and the initial complaint did involve the same parties and the same nucleus of operative fact, a decision by the court would have required an analysis based upon judicial standards which differed from those presented in the Title VII and Rehab Act claims. The issues proposed by the amended claim of constitutional tort were legal and required no additional discovery to posture them for adjudication.

The question of constitutional tort was not litigated in the original action as required by United States v. Maser, 45 S. Ct. 66 (1924). The question of constitutional tort and a final judgment on the merits have not been determined by a court of competent jurisdiction as required by Southern Pacific R. Co. v. United States, 18 S. Ct. 18 (1897).

Defendant's motion is correct in that A) the initial complaint of civil rights violations, B) the motion to amend said initial complaint to include a claim of constitutional tort, and C) the complaint of constitutional tort before this court involve the same

parties and the same nucleus of operative fact; however the Defendant is incorrect in that no final judgment on the merits of the claim of constitutional rights violations has been rendered by a court of competent jurisdiction as required by Ragsdale, supra. The district court cannot, in the exercise of its discretion, treat as "final", that which is not "final" within the meaning of section 1291. Sears, Roebuck and Co. v. MacKey, 76 S. Ct. 895, 900 (1956).

As the United States Court of Appeals for the Eight Circuit did observe in Kelsey v. State of Minn., 565, F.2d 503 (1977); the amended complaint was not considered by the court and Plaintiff is free to file a new action alleging the claims of constitutional rights violations which were alleged in the amended complaint (Document No. 97, 99, 104) which was timely filed in the prior litigation.

PLAINTIFF IS NOT BARRED FROM INITIATING A CAUSE OF ACTION UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Plaintiff believes this to be the single issue worthy of consideration by this court in the instant motion for summary judgment and that said issue is purely a question of law.

The composite of actions by the United States Government/Department of the Treasury were not **personnel actions** subject to remedy under section 717 Title VII of the Civil Rights Act of 1964. The act of retaliation in work assignments was recognized by Plaintiff as a personnel action and was the subject of a previous lawsuit under section 717(a) Title VII of the Civil Rights Act of 1964, as amended. Brown v. General Services Administation, 96 S. Ct. at 1966 (Document No 1).

The actions by the United States Government /Department of the Treasury are excepted from the judicial restrictions of section 717 via section 712 Title VII of the Civil Rights Act of 1964 in that said composite of actions, as described in the complaint currently before this court, were in violation of the constitutional rights of a totally and permanently disabled veteran.

Federal employment discrimination clearly violated the Constitution before the passage of the 1972 Act. Brown v. General Services Administration, at 1964 (Citing Bolling v. Sharpe, 74 S. Ct. 695 (1954)). Section 712 of Title VII did originate under the 1964 Civil Rights Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes". Brown v. General Services Administration, 96 S. Ct. at 1968. Section 717 of Title VII leaves undisturbed whatever remedies plaintiff might otherwise possess. Davis v. Passman, 96 S. Ct. at 2278. As in the case of Brooks v. United States, 69 S. Ct. 918 (1949), it would be absurd to believe congress did not have the Constitutional rights of veterans in mind when they passed section 712 Title VII of the Civil Rights Act of 1964 and a reading of the entire Act reflects upon such an objective and policy. Plaintiff is therefore permitted to pursue his rights under both Title VII and any other law creating a special right as a totally and permanently disabled veteran.

The constitutional violations of Plaintiff's rights by the United States Government were invidious in nature and so unjustifiable as to be violative of due process under United States v. Gilman, 74 S. Ct. 695 (1954) and subject to challenge under Washington v. Davis, 96 S. Ct. 2040 (1996).

At page seven of the instant motion for summary judgment , Defendant provides the following statement:

> "In Brown v. General Servs. Admin., 425 U.S. 820, 835 (1976), the Supreme Court held that Title VII of the Civil Rights Act of 1964 ' provides the exclusive judicial remedy for claims of discrimination in federal employment.'"

Defendant has incorrectly stated the conclusions by the Supreme Court in that the Court determined that **section 717** of Title VII of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment. Brown v. General Services Administration, 96 S. Ct. at 1969. The distinction is very important in that **section 712** of Title VII of the Civil Rights Act of 1964, as originally passed by Congress, does provide an important exception to the judicial restrictions of section 717 as recognized by the Supreme Court in Brown v. General Services Administration, supra.

The exception to section 717 under section 712 of Title VII of the Civil Rights Act of 1964 will require an affirmative ruling by the court regarding the following legal questions:

1. Do totally and permanently disabled veterans have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

2. "Nothing contained in this title shall be construed to repeal or modify any *Federal*,

State, territorial, or local *law creating special rights* or preference *for veterans.*" Section 712 of the Civil Rights Act of 1964. Does recognition of the constitutional right referenced above provide a *special right* directed to totally and permanently disabled veterans in the employ of the United States Government ?

The following consideration are presented to the court in support of an affirmative response to the legal questions presented above.

Confirmation of Plaintiff's status as totally and permanently disabled veteran in correspondence from the Department of Veterans Affairs (Document No. 25 exhibit I).

"Mr. Starnes of Alabama. 'Mr. Speaker, from the very inception of our Republic our Government has extended certain special benefits and privileges to the men who have offered their lives in the defense of the country and its institutions. This is a sound principal.'" Congressional Record April 17, 1944 Veterans Preference in the Federal Civil Service.

The Federal Government, in its capacity as an employer, determined to take the lead in such a program. The Veterans' Preference Act was accordingly adopted, creating special preferences and protection for returning veterans at every stage of federal employment. Mitchell v. Cohen, 68 S. Ct. 518 (1948).

The first comprehensive federal veterans' statute was enacted in the Veterans' Preference Act of 1944, 58 Stat 387. The Federal Government has, however engaged in preferential hiring of veterans, through official policies and various special laws, since the Civil War. Personnel Adm'r

of Massachusetts v. Feeney, 99 S. Ct. 2282 (1979). The protection afforded the special rights and preferences for veterans under section 712 of Title VII of the Civil Rights Act of 1964 from constitutional challenge was recognized by the Supreme Court in Personnel Adm'r of Massachusetts v. Feeney, at 2286.

U.S.C. Title 5 sections 2108 and 3502 provide special considerations to disabled veterans upon entering and retaining employment with the Federal Government. U.S.C. Title 38 provides an extensive array of benefits available to disabled veterans including healthcare, education, housing assistance, clothing allowance, car allowance, compensation for service connected injuries, insurance, etc.

Section 403 of the Vietnam Era Veterans' Readjustment Assistance Act , 38 U.S.C. section 4214, provides at (a)(1):

> "It is, therefore, the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for disabled veterans and certain veterans of the Vietnam Era."

Based upon the standards established by the United States Supreme Court in Washington v. Glucksberg 117 S. Ct. 2258, 2269 (1997), Plaintiff has a fundamental and constitutionally protected liberty interest which prohibits continuous **acts** of employment related threats of physical injury, discrimination and retaliation by the same **government** which put him in harms way in Vietnam.

The United States Government has violated the

constitutional rights of an American who became disabled in the service of his country. Plaintiff has a constitutional right to be free from and to obtain judicial relief for unjustified intrusions on personal security in the employ of the United States Government. Ingraham v. Wright, 97 S. Ct. 1401, 1413 (1977). Based upon the federal employment benefits extended to disabled veterans by Congress, Plaintiff's expectation of process was justifiable and did rise to the level of a constitutionally protected liberty interest. United States v. Stead, 740 F.2d 657 (8th Cir. 1984).

Section 712 of Title VII Civil Rights Act of 1964 was born of the United States Constitution and Congress did by statute bridge the gap between said Act and the Constitution. No provision of Title VII may restrict a veterans constitutional rights and the courts, not legislative bodies, are charged with the duty to interpret the legitimate rights of veterans under the Constitution of the United States.

The section 717 restriction on remedy was **inferred** by the United States Supreme Court in *Brown v. General Service Administration*; however the language of section 712 of Title VII is **explicit**, **unambiguous** and **unchanged** since Congressional enactment.

Reliance by the defendant on *Brown v. General Service Administration*, is misplaced based upon the express provision of Congress under section 712 of Title VII of the Civil Rights Act of 1964 and the findings by the United States Supreme Court that discrimination by the United States Government may be so unfair as to violate Fifth Amendment rights.

Section 712 of Title VII of the Civil Rights Act of

1964 provides that Title VII is not the exclusive remedy for a veteran who in this case has been recognized by the United States Government as service connected in a state of permanent and total disability. The fact said veteran is an employee of the United States Government should not deprive him of his constitutional rights.

Section 712 of Title VII was not referenced in *Brown v. General Service Administration* nor *Porter v. Adams* and therefore was not a fact in consideration by the respective courts.

V. CONCLUSION

This is a complaint of constitutional tort for **actions by the United States** Government which were egregious and continuous in nature. Said actions were the direct result of an abusive institutional environment which did promote, and failed to provide a venue for relief from said actions. "In passing on a motion to dismiss for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 94 S. Ct. 1683 (1974).

Plaintiff takes strong exception to the following statement by Defendant at page four of the instant motion:

> "Specifically, in both actions, Plaintiff challenges the Department of Treasury's current organizational structure which, because he is unwilling to work under the supervision of Mr. Prowler, relegates Plaintiff to performing 'examinations below Plaintiff's working grade level,' rather than more challenging 'examinations of the largest and most complex entities.'"

The United States Government cannot create and actively condone a work environment in which a disabled veteran is threatened with physical harm on multiple occasions, harassed and retaliated against for reporting the threats, and then informed by the United States Government that because he was not physically injured he has no claim to relief. The facts in support of the unconstitutional governmental actions were well documented and supported by third-party testimony in the previous litigation.

The abuse of discretion in the denial of Plaintiff's right to a "full and fair opportunity to litigate" the alleged constitutional rights violation is symptomatic of the prior conduct of this court and subject to remedy by this court in the instant complaint.

Plaintiff believes the alleged constitutional rights violations are worthy of review by this court based upon consideration of the Supreme Court's decision in *Brown v. General Services Administration, supra*,. 96 S. Ct. at 1968. Based upon the facts specific to this complaint, there is an obvious conflict between the Supreme Courts **implied** judicial restrictions associated with actions under section 717 and the **explicit** exception provided under section 712 of Title VII of the Civil Rights Act of 1964, as amended.

WHEREFORE, Plaintiff respectfully requests that the court deny Defendant's motion for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure in that the moving party is not entitled to judgment as a matter of law.

Respectfully submitted under penalty of perjury this seventh day of November, 2000.

"S/Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Todd B. Grandy this seventh day of November, 2000 in accordance with Federal Rule of Civil Procedure 5.

"S/Melvin E. Blough" pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MELVIN E. BLOUGH,

Plaintiff,

Case No. 8:00CV1631-T-26E

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF THE TREASURY, LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendants.

_____/

DOCUMENTS IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS PROVIDED UNDER COURT ORDER OF OCTOBER 17, 2000.

INDEX

TITLE OF DOCUMENT	EXHIBIT / DOCUMENT*
District court docket sheet	A
Initial complaint under Title VII of the Civil Rights Act of 1964	1
Motion in support of preliminary injunction	25
Transcript of preliminary injunction proceedings	32
Motion to amend complaint 1973 Rehabilitation Act	33
Defendant's opposition to motion # 33	36
Motion for leave to file in support of # 33 motion	49
Defendant's response to motion # 49	54
Motion to amend complaint to include claim Constitutional right violation	97
Defendant's response to motion # 97	99
Order granting motion to file memo in support # 33 motion	102
Motion in support motion # 97	104
Memorandum in support motion # 33	106

Plaintiff's response to motion for summary judgment	107
Order granting summary judgment to defendant	111
Appellate court affirmation district court Order #111	B
Complaint of Constitutional tort currently before this court	C

* Document numbers correspond to district court docket sheet numbers in initial claim of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended.

00-16546-F

IN THE

United States Court of Appeals Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF THE TREASURY,
Secretary of the Treasury,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION (D.C. Docket NO.: 00-1631 CV-T-26E)

BRIEF FOR APPELLANT

MELVIN E. BLOUGH
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BLOUGH v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE TREASURY, Secretary of the Treasury

(11th Cir. - No. 00-16546-F)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following listed persons and entities have an interest in the outcome of this case:

1. Todd Bradshaw Grandy, Assistant United States Attorney, district court counsel for United States of America;

2. Melvin E. Blough, plaintiff-appellant, pro se;

3. Donna A. Bucella, United States Attorney;

4. The Honorable Richard A. Lazzara, United States District Judge;

5. Secretary of the Treasury, defendant-appellee.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument.

TABLE OF CONTENTS

	Page
Certificate of Interested Persons	(i)
Statement Regarding Oral Argument	(ii)
Table of Contents	(ii)
Table of Citations and Authorities	(iii) - (v)
Statement of Jurisdiction	(vi)
Statement of Issues Presented for Review	1-2
Statement of the Case and Facts	2-10
(i) Course of proceedings and disposition in the court below	3
(ii) Statement of facts	3-10
(iii) Standard of review	10
Summary of Arguments	11
Arguments and Citations of Authority	11-28
Conclusion	28-29
Certificate of Service	30

TABLE OF CITATIONS AND AUTHORITIES

	Page
Alexander v. Gardner-Denver Co., 94 S. Ct. 1011 (1974)	16
Armstrong v. Manzo, 85 S. Ct. 1187 (1965)	25
Bank of Jackson County v. Cherry, 980 F.2d 1362 (11th Cir. 1993)	23
Boddie v. Connecticut, 91 S. Ct. 780 (1971)	21*
Bolling v. Sharpe, 74 S. Ct. 693 (1954)	12*
Brooks v. United States, 69 S. Ct. 918 (1949)	15, 17
Brown v. General Services Admin., 96 S. Ct. 1969 (1976)	1, 13, 14,* 17, 18, 27
Conley v. Gibson, 78 S. Ct. 99 (1957)	24
Connecticut Nat. Bank v. Germain, 112 S. Ct. 1146 (1992)	16
Daniels v. Williams, 106 S. Ct. 662 (1986)	22
Davis v. Passman, 99 S. Ct. 2264 (1979)	2, 12, 14, 17*
Ferguson v. Skrupa, 372 U.S. 726 (1963)	12
Foman v. Davis, 83 S. Ct. 224 (1962)	25
Fourco Glass Co. v. Transmirra Products Corp., 77 S. Ct. 787 (1957)	16

Harman v. Forssenius, 85 S. Ct. 1177 (1965) 12

Ingraham v. Wright, 97 S. Ct. 1401 (1977) 13, 20*

Jones v. Hildebrant, 97 S. Ct. 2283 (1997) 24*

Kelsey v. State of Minn.,
565 F.2d 503 (8th Cir. 1977) 28*

Larson v. Domestic & Foreign,
69 S. Ct. 1457 (1949) 11*

Lehr v. Robertson, 103 S. Ct. 2985 (1983) 1*

McKinney v. Missouri-Kansas-Texas Co.,
78 S. Ct. 1222 (1958) 28

McVeigh v. U.S., 11 Wall. 259 22

Mitchel v. Cohen, 68 S. Ct. 518 (1948) 19

Montana v. U.S., 99 S. Ct. 970 (1979) 23, 26 *

Moore v. City of East Cleveland, Ohio
97 S. Ct. 1932 (1977) 11

Murphy v. Hunt, 102 S. Ct. 1183 (1982) 25

Palko v. State of Connecticut, 302 U.S. 319 (1937) 22

Personnel Adm'r of Massachusetts v. Feeney,
99 S. Ct. 2282 (1979) 19

Porter v. Adams, 639 F.2d 273 (5th Cir. 1981) 14

Ragsdale v. Rubbermaid,
193 F.3d 1235 (11th Cir. 1999) 23, 26, 27*

Reed v. Reed, 92 S. Ct. 251 (1971) 2

Richards v. United States, 82 S. Ct. 585 (1962) 15

Sears, Roebuck and Co. v. Mackey, 76 S. Ct.895 (1956) 25, 27*

Siegert v. Gilley, 111 S. Ct. 1789 (1991) 1

Southern Pacific R. Co. v. United States, 18 S. Ct.18 (1897) 27

Tiller v. Atlantic Coast Line R. Co., 65 S. Ct. 421 (1945) 24*

United States v. Gilman, 74 S. Ct. 695 (1954) 12, 17

United States v. Moser, 45 S. Ct. 66 (1924) 23, 27*

United States v. Stead, 740 F.2d 657 (8th Cir. (1984) 13, 20

Washington v. Davis, 96 S. Ct. 2040 (1976) 10, 12, 17, 24, 27 *

Washington v. Glucksberg, 117 S. Ct. 2258 (1997) 12, 20 *

Windsor v. McVeigh,93 U.S. 277 22

STATEMENT OF JURISDICTION

This Court has jurisdiction over the subject matter of this case in that appellant's claim arises under the Federal Constitution (28 U.S.C. section 1331) and represents an appeal of a final decision by the United States District Court for the Middle District of Florida Tampa Division (28 U.S.C. section 1291).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. When due process clause is invoked in novel context, court must begin inquiry with determination of precise nature of private interest that is threatened, and only after that interest has been identified, can court properly evaluate adequacy of process. Lehr v. Robertson, 103 S. Ct. 2985 (1983).

   "A necessary concomitant to the determination of whether the constitutional right asserted by the plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of the **purely legal question** (emphasis added) permits courts expeditiously to weed out suits which fail the test." Siegert v.Gilley, 111 S. Ct. 1789, 1793 (1991).

   Do totally and permanently disabled veterans have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

2. "(Title VII) Section 717 of the Civil Rights Act of

1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Services Administration, 96 S. Ct. at 1969.

"Nothing contained in this title shall be construed to repeal or modify any *Federal*, State, territorial, or local *law creating special rights* or preference *for veterans*." Title VII Section 712 of the Civil Rights Act of 1964.

Does recognition of the constitutional right as stated in issue number one above; provide a *special right* (under Title VII section 712 of the Civil Rights Act of 1964) of exception to the exclusive judicial remedy inferred by the United States Supreme Court in *Brown v. General Services Administration* ?

3. The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. Reed v. Reed, 92 S. Ct 251, 254 (1971).

"Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of recognition of otherwise sound constitutional principles." Davis v. Passman, 99 S. Ct. 2264 (1979) (citing Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 91 S. Ct. 1999 (1971)).

The United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit did not consider Appellant's (hereafter Blough) pleadings in the prior litigation and have applied the doctrine of res judicata to the current litigation. The actions of the respective Courts constitute an abuse of power in the denial of a full and fair opportunity to litigate a Complaint of Constitutional tort by the United States Government. The violation of Blough's Fifth Amendment right to procedural due process reflects disparate treatment and is unconstitutional.

STATEMENT OF THE CASE

The Fifth Amendment to the United States Constitution provides in part that "no person shall be ... deprived of life, liberty, or property, without due process of law ...." U.S. Const. amend V. It is clearly established that this clause provides both procedural and substantive due process protection from actions of the federal government.

This Complaint does encompass both substantive and procedural due process violations by the United States Government in the deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution:

(i) Course of proceedings and disposition in the court below:

Blough did initiate suit in district court alleging Fifth Amendment Constitutional Rights violations by Appellee (hereafter Government) (R1-1). The district court did grant Governments motion for summary

judgment based upon the doctrine of *res judicata* (RI-11).

(ii) Statement of the facts:

Status of Blough Providing for the Constitutionally Protect Liberty Interest Presented in Issues Number One and Two:

Blough is one of approximately fifty-one thousand combat disabled veterans recognized as totally and permanently disabled by the Department of Veterans Affairs (source: Department of Veterans Affairs FY 1998 Annual Report). Blough has two artificial legs and loss of use of one hand as a result of service in Vietnam (R1-10-25SR). The United States Government has since 1970 accepted full responsibility and liability for the aforementioned status of Blough.

Blough has been employed by the United States Government /Department of the Treasury since 1979 as an Internal Revenue Agent.

The Procedural-Due-Process Violation Presented as Issue Number Three:

The following allegation was presented in the Complaint of discrimination initially filed with the United States District Court for the Middle District of Florida Tampa Division on June 29, 1998 (R1-10-1SR):

> "The United States Government Department of the Treasury (Defendant/employer) has engaged in the unlawful and unconscionable employment practice of threatening physical injury to a disabled veteran (Plaintiff/employee) ...."

The initial Complaint is properly appended to include the following:

> The United States Government in the capacity of the United States District Court for the Middle District of Florida Tampa Division and the United States Court of Appeals for the Eleventh Circuit has engaged in the unlawful and unconscionable act of denying due process to a totally and permanently disabled veteran in a Complaint of Constitutional tort by the United States Government. The denial of due process was the direct result of disparate treatment by the respective Court's. The court record clearly reflects the fact that the Court's were predetermined to dispose of the Complaint are their earliest convenience and did not consider the pleadings as presented by Blough.

THE INITIAL CONPLAINT

The complaint as initially filed with the district court on June 29, 1998 did encompass a claim of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended (R1-1SR). The initial complaint did also reference the physical disabilities of Blough, the threats of physical injury to Blough and the informal response/formal acceptance of said threats by the Government (Department of the Treasury and the Equal Employment Opportunity Commission).

A Claim of deprivation of a protected Fifth Amendment liberty interest by the Government was raised by Blough in response to the question of irreparable injury during the course of a preliminary injunction hearing (R1-10-32SR). The claim was supported in Blough's pleadings of February 16, 1999

with extensive documentation and third-party confirmation of the physical threats against Blough.

Blough did timely file motions to amend the initial complaint under the provisions of Rule 15(a) of the Federal Rules of Civil Procedure to include violations under the Rehabilitation Act of 1973 (R1-10-33SR, 36SR, 49SR, 54SR, 106SR), and a claim of constitutional tort against the United States Government (R1-10- 97SR, 99SR, 104SR).

The following statements were presented in Blough's motion for leave to amend the initial complaint (R1-10- 97SR) under rule 15(a):

> "Plaintiff has met the 'relation back' doctrine under 15(c)(2) of the Federal Rules of Civil Procedure in that the initial Complaint did reference the fear experienced by Plaintiff and threats, harassment and retaliation directed to Plaintiff by agents of Defendant since 1991.
>
> The essence of Plaintiff's initial complaint under Title VII is that he has been subject to a continuing series of threats, harassment, intimidation and retaliation as a pretext for adverse action over an eight year period. Said actions are also the basis in this Fifth Amendment claim."

A motion for summary judgment was taken under submission by the district court on September 10, 1999. Briefs and affidavits of the parties were to be filed by said date.

A) On September 10, 1999 the court was in possession of Blough's motion to amend the initial complaint, memorandum of law in support of motion to amend the complaint,

and the Government's motion in opposition to the motion to amend the complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR, 36SR, 49SR, 54SR, 106SR).

B) Prior to September 10, 1999 the court was in possession of Blough's motion to amend the initial complaint, memorandum of law in support of motion to amend the complaint, and the Government's motion in opposition to the motion to amend the complaint to include a claim of constitutional tort against the United States Government (R1-10-97SR, 99SR, 104SR).

The district court did concurrently grant Government's motion for summary judgment in the complaints of Civil Rights and Rehabilitation Act violations (R1-10-111SR); however did abuse its power in that the court did not consider Blough's pleadings in response to the Government's motion for summary judgment (R1-10-107SR) and Blough's motion to amend the initial complaint to include a claim of constitutional tort by the United States Government (R1-10-97SR, 99SR, 104SR). These conclusions are evident upon review of the Order of the district court (R1-10-111SR):

A) The following statement is presented within the initial paragraph of the Order of the district court(R1-10-111SR):

"This cause comes before the Court on defendant's Motion for Summary Judgment (Doc. No. 75). Plaintiff has filed a response in opposition (Doc. No. 107)."

The following statements were presented in

Blough's response to Government's motion for summary judgment (R1-10-107SR):

"Two motions are pending before the Court to amend the initial Complaint of employment related discrimination under Title VII of the Civil Rights Act of 1964. The facts presented in this Complaint are so egregious such as to violate multiple statutes and the Constitution itself. It would be inappropriate for the Court to consider this motion for summary judgment which is limited to a single claim within a multi-facet Complaint.

Upon completion of the amending process the Complaint will incorporate the following courses of action (claims) which utilize three different routes to reach the ultimate conclusion of discrimination. **The facts are consistent with each route; however the law and remedies differ** (emphasis added).

1. Deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution.

2. Unlawful intentional discrimination which is prohibited under Title VII, sections 704 and 717 of the Civil Rights Act of 1964, as amended.

3. Unlawful intentional discrimination which is prohibited under the Rehabilitation Act of 1973, as amended."

Conclusion: The district court did not review Blough's pleadings (R1-10-107SR) in response to the Government's motion for summary judgment in that the Order of the district court (R1-10-111SR) does not reference the motion to amend for constitutional tort (R1-10-97SR, 99SR, 104SR) which was prominent in Blough's pleadings.

Review of the Order of the district court (R1-10-111SR) in conjunction with Blough's response to Government's motion for summary judgment (R1-10-107SR) provides further evidence that the district court did not review Blough's pleadings. The Order misrepresents the pleadings of both parties, creates an absurd scenario and then ridicules Blough for proposing said scenario.

B) The following statement is also presented within the initial paragraph of the Order of the district court (R1-10-111SR):

> "Plaintiff has also filed various papers which appear to be addressed to his Motion to Amend Complaint and/or his response to defendant's Motion for Summary Judgment. See Doc. 104 and 105."

Document 104 (R1-10-104SR) is a five page memorandum of law in support of Blough's motion the amend the initial complaint to include a claim of constitutional tort against the United States (R1-10-97SR) and was filed in response to the Government's motion in

opposition to Blough's motion to so amend (R1-10-99SR).

Document 105 is a three page motion and memorandum of law requesting a trial by jury. The following comments are noted within said motion:

> "Although the 5th amendment claim was at the heart of the initial complaint, it was a difficult issue for pro se Plaintiff to frame.
>
> The second motion to amend the initial complaint does contain an issue which is best addressed by a jury (i.e. deprivation of a fundamental and protected liberty interest which exists within the fifth amendment to the United States Constitution.
>
> Defendant was apprised of this 5th amendment challenge upon consideration of the facts presented in the initial complaint, the preliminary injunction hearing, and during the deposition of Plaintiff by Defendant."

Conclusion: The district court did not review either Document No. 104 or Document No. 105 in that the Order of the district court (R1-10-111SR) does not reference the motion to amend for constitutional tort which was prominent in both documents.

C) The following statement is also presented within the initial paragraph of the Order of the district court (R1-10-111SR):

> "Also before the Court is plaintiff's Motion to Amend Complaint (Doc. No. 33) and defendant's response in opposition (Doc. No. 36)."
>
> The Order was limited to the alleged violations under Title VII of the Civil Rights Act of 1964, as amended, (R1-10-1SR) and the motion to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR, 36SR, 49SR, 54SR, 106SR). The Order by the district court (R1-10-111SR) specifically states "Plaintiff's Motion to Amend Complaint (Doc. No. 33) is denied for the reasons set forth in this Order".

The district court did not rule in the prior litigation upon the merits of the instant complaint of constitutional tort (R1-1) which was properly filed in conjunction with the initial complaint (R1-10-1). This was an abuse of power in the denial of Blough's right to procedural due process.

The same parties are presented in this complaint of constitutional tort and A) the initial complaint alleging violations under Title VII of the Civil Rights Act of 1964, as amended, B) the motion to amend the initial complaint to include the Rehabilitation Act of 1973, and C) the motion to amend the initial complaint to include a claim of constitutional tort against the United State Government. This complaint of constitutional tort arose out of the same nucleus of conduct, transactions and occurrences set forth in A) the initial complaint of discrimination under Title VII of the Civil Rights Act of 1964, as amended, B) the motion to amend the initial complaint to include the Rehabilitation Act of 1973, and C) the motion to amend the initial complaint to include a claim of

constitutional tort against the United States Government.

THE INITIAL APPEAL

Blough did appeal the decision by the district court (R1-10-111SR) that the pending motions (R1-10-97SR, 99SR, 104SR) to amend the initial Complaint to include a claim of Constitutional deprivation of a fundamental and protected liberty interest by the United States Government were moot (United States Court of Appeals Eleventh Circuit Case No. 99-13735-FF). On May 9, 2000 the appellate court "rubber stamped" the decision of the district court and provided no comment relative to the pending motions to amend the initial complaint to include a claim of Constitutional tort (R1-10-Exhibit B SR). This was an abuse of power in the denial of Blough's right to procedural due process. The de novo standard of review was required relative to the Order of the district court (R1-10-111SR) denying all pending motions as moot.

THE CURRENT APPEAL

On August 8, 2000 Blough initiated suit in the United States District Court for the Middle District of Florida Tampa Division (R1-1) in the consistent and continuing allegation that "the United States of America did violate Plaintiff's Constitutional right as a totally and permanently disabled veteran to be secure in a fundamental and protected Fifth Amendment liberty interest. The violations did manifest as continuous acts of employment related threats of physical injury, harassment and retaliation over a nine year period."

The Complaint of August 8, 2000 (R1-1) includes the following reference to the prior litigation:

> "The Court did fail to address the specific allegations of Constitutional rights violations which were presented as an amendment to the above referenced Complaint of civil rights violations. 'We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.' Washington v. Davis, 96 S. Ct. 2040 (1976). **This Court has not addressed the merits in the Complaint under the 'constitutional standards' required by the United States Supreme Court in** *Washington v. Davis, supra.*"

The district court did grant Government's motion for summary judgment (R1-8) based upon the doctrine of *res judicata* (R1-11) and Blough has appealed said decision to this Court (R1-13). Blough's appeal is based upon the following statement by the trail judge in the dispositive Order (R1- 11) and reflects upon a continuing abuse of power by the Courts in the myopic view of the facts presented (R1-10) in Blough's asserted right to due process of law:

> "Moreover, as the Plaintiff has conceded, the claim he asserts in this case was always a part of the claim he asserted in the prior case. Even if it were not, it is manifestly clear from the record that the Plaintiff was well aware of the so-called constitutional tort claim based on the Fifth Amendment at the very inception of the earlier case and, therefore, **could easily have raised it in that case** (emphasis added)."

(iii) Standard of review:

Abuse of power by the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit is the correct standard of review. It is the judicial responsibility of the respective courts to review the pleadings of both parties prior to the rendering of a final decision. The failure of the respective courts to conduct said review of either parties pleadings and summarily disenfranchise a party to the litigation of their constitutionally guaranteed right to due process is a denial of due process.

Abuse of discretion is not the correct standard of review in that no decisions were rendered on the motion to amend the initial Complaint to include a deprivation of a protected liberty under the Fifth Amendment to the United States Constitution.

SUMMARY OF THE ARGUMENTS

1. The substantive due process violation did manifest as an abuse of power within the Executive Branch of the United States Government in the deprivation of the liberty interest presented as issue number one.

2. The procedural due process violation did manifest as an abuse of power within the Judicial Branch of the United States Government in the denial of a full and fair opportunity to litigate as presented in issue number three.

ARGUMENT AND CITATIONS OF AUTHORITY

<u>The Federal Question Presented as Issues Number One and Two:</u>

"It is argued that the principal of sovereign immunity is an archaic hang-over not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend." Larson v. Domestic & Foreign Commerce Corporation, 69 S. Ct. 1457 (1949) (citing Brooks v. United States, 69 S. Ct. 918).

"Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. Larson, 69 S. Ct. at 1468.

1. Protected liberty interest under the Fifth Amendment to the United States Constitution.

"Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and], solid recognition of the basic values that underlie our society. Moore v. City of East Cleveland, Ohio, 97 S. Ct. 1932, 1937 (1977) (citing Griswold v. Connecticut, 85 S. Ct. at 1691).

"The right is fundamental 'because preservative of all rights.'" Harman v. Forssenius, 85 S. Ct. 1177, 1183 (1965) (citing Yick Wo v. Hopkins, 6 S. Ct. 1064).

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct

which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." Bolling v. Sharpe, 74 S. Ct. 693 (1954).

"Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' *id.*, 97 S. Ct. at 1938; *Snyder v. Massachusetts*, 54 S. Ct. 330 (1934) ('so rooted in the traditions and conscience of our people as to be ranked as fundamental'), and 'implicit in the concept of ordered liberty', such that 'neither liberty nor justice would exist if they were sacrificed,' *Palko v. Connecticut*, 58 S. Ct. 149 (1937). Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' Collins, 112 S. Ct. at 1068, that direct and restrain our exposition of the Due Process Clause. Washington v. Glucksberg, 117 S. Ct. 2258, 2269 (1997).

"Discrimination may be so unjustifiable as to be violative of due process." United States v. Gilman, 74 S. Ct. 695 (1954) (citing Detroit Bank v. United States, 63 S. Ct. 297; Currin v. Wallace, 59 S. Ct. 379; Steward Machine Co. v. Davis, 57 S. Ct. 883). "It is only invidious discrimination which offends the Constitution". Ferguson v. Skrupa, 372 U.S. 726 (1963).

The due process clause of the Fifth Amendment contains an equal protection component prohibiting the United States government from invidious discrimination. Washington v. Davis, 96 S. Ct. 2040 (1976). Unconstitutional federal employment

discrimination was deemed actionable in the Federal Courts based upon a claim directed to the due process clause of the Fifth Amendment. Davis v. Passman, 99 S. Ct. 2264 (1979).

"The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against government power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' *Meyer v. Nebraska*, 43 S. Ct. 625 (1889). Among the historic liberties so protected was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security." Ingraham v. Wright, 97 S. Ct. 1401, 1413 (1977).

"The veterans' expectation of process was justifiable. This justifiable and objective expectation, like that held by the prisioners in *Vitek* and *Wolff*, rises to the level of a constitutionally protected liberty interest and requires appropriate process in the determination that the statutory criteria for transferring the veterans are met." United States v. Stead, 740 F.2d 657 (8th Cir. 1984).

2. Section 717 of Title VII of the Civil Rights Act of 1964, as amended.

"The primary question in this litigation is not difficult to state: Is section 717 of the Civil Rights Act of 1964, as added by section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. section 2000e-16 the exclusive individual remedy available to a federal employee complaining of job-

related discrimination? But the question is easier to state than it is to resolve. Congress simply failed explicitly to describe section 717's position in the constellation of antidiscrimination law. We must, therefor, infer congressional intent in less obvious ways." Brown v. General Services Administration, 96 S. Ct. 1961 (**Decided June 1, 1976).**

Federal employment discrimination clearly violated the Constitution before passage of the 1972 Act. Brown v. General Services Administration, 96 S. Ct. at 1964 (citing *Bolling v. Sharpe*, 74 S. Ct. 693 (1954).

"Section 717(a) provides that all **personnel actions** (emphasis added) affecting federal employees and applicants for federal employment 'shall be made free from any discrimination based on race, color, religion, sex, or national origin.'" Brown v. General Services Administration, 96 S. Ct. at 1966.

"The petitioner relies upon our decision in *Johnson v. Railway Express Agency*, 95 S. Ct. 1716 (1975), for the proposition that Title VII did not repeal pre-existing remedies for employment discrimination. In *Johnson* the Court held that in the context of *private employment* Title VII did not pre-empt other remedies. But that decision is inapposite here. In the first place, there were no problems of sovereign immunity in the context of the *Johnson* case. Second, the holding in *Johnson* rested upon **the explicit legislative history of the 1964 Act which "' manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.'"** (emphasis added) 95 S. Ct. at 1719 quoting *Alexander v. Gardner-Denver Co.*, 94 S. Ct. 1011, 1019-20. **There is no such legislative history behind the 1972 amendments.** (emphasis

added). Indeed, as indicated above, the congressional understanding was precisely to the contrary. Brown v. General Services Administration, 96 S. Ct. at 1968.

"In the case at bar, as in *Preiser* and the other cases cited above, the established principal leads unerringly to the conclusion that section 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Services Administration, 96 S. Ct. at 1969.

"Because we conclude that section 717 bars reprisals against federal employees who file charges of discrimination, appellant must bring her action under that section." Porter v. Adams, 639 F.2d 273 (U.S.C.A 5th Cir. 3/13/81) (citing Brown v. GSA, 96 S. Ct. at 1969).

"Like the plaintiffs in *Bolling v. Sharp*, supra, petitioner rests her claim directly on the Due Process Clause of the Fifth Amendment. There is in this case 'no *explicit* congressional declaration that persons' in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury." Davis v. Passman, 99 S. Ct. 2264, 2276, 2278 (1979) (citing Bivens v. Six Unknown Federal Narcotics Agents, 91 S. Ct. 1999 (1971)). **"On the contrary, section 717 leaves undisturbed whatever remedies petitioner might otherwise possess."** (emphasis added) Davis v. Passman, 96 S. Ct. at 2278.

3. Section 712 of Title VII of the Civil Rights Act of 1964.

"Nothing contained in this title shall be construed to repeal or modify any **Federal,** State, territorial, or local **law creating special rights** or

preference **for veterans**. (emphasis added). Public Law 88-352, July 2, 1964 ("Civil Rights Act of 1964").

Interpretation of the same words in different statutes may vary with the consequences, for such consequences may provide insight for determination of congressional purpose. "We brought the case here on certiorari because of its importance as an interpretation of the Act. It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed." Brooks v. United States, 69 S. Ct. 918 (1949).

"We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibilities in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provision of the whole law, and to its object and policy." Richards v. United States, 82 S. Ct. 585, 591 (1962).

The following statements by Senator McCarthy appear in the Congressional Record June 19, 1964 in regard to the Civil Rights Act of 1964:

"The search for freedom and for a world in which freedom and equality can be enjoyed has been a preoccupation of civilized people throughout the history of the world. Certainly, it has been a preoccupation of Americans since this country was first settled. One man has said: once we have declared for liberty and for freedom and for equality, we have declared for an unending war in an unending revolution. Certainly, we in the United States have declared more often, more consistently and more loudly, for equality, for liberty and freedom; and consequently, we must bear the burden of that revolution and give the example.

These rights were claimed on the basis of the nature of man and the nature of a person. All of these rights to which we now refer today, on another occasion were declared to be the inalienable rights of all men. These civil rights do not derive because of law but, rather, derive from the very nature of man himself. They have their basis and they rest in that nature. We have made these basic human rights civil rights, and we have sought to guarantee and protect them through the Constitution of the United States and of the States, and through the laws of the land."

The equal employment provisions of the Civil Rights Act were designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. Alexander v. Gardner-Denver Co., 94 S. Ct. 1011 (1974). "Generally, a law will survive scrutiny under the equal protection clause if the distinction rationally furthers a legitimate state purpose." Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985).

"We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" Connecticut Nat. Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (citing Rubin v. United States, 101 S. Ct. 698,701 (1981).

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' Ginsberg & Sons v.

Popkin, 52 S. Ct. 322." Fourco Glass Co. v. Transmirra Products Corp., 77 S. Ct. 787, 791 (1957).

BLOUGH DOES HAVE A FUNDAMENTAL AND CONSTITUTIONALLY PROTECTED LIBERTY INTEREST WHICH PROHIBITS CONTINUOUS ACTS OF EMPLOYMENT RELATED THREATS OF PHYSICAL INJURY, DISCRIMINATION AND RETALIATION BY THE UNITED STATES GOVERNMENT AND IS NOT BARRED FROM INITIATING A CAUSE OF ACTION UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Issues number one and two are purely questions of law and are essential to this complaint of substantive and procedural due process violations.

The composite of actions by the United States Government/Department of the Treasury were not **personnel actions** subject to remedy under section 717 Title VII of the Civil Rights Act of 1964. The act of retaliation in work assignments was recognized by Blough as a personnel action and was the subject of a previous lawsuit under section 717(a) Title VII of the Civil Rights Act of 1964, as amended. Brown v. General Services Administation, 96 S. Ct. at 1966 (Document No 1).

The **actions by the United States Government/ Department of the Treasury** are excepted from the judicial restrictions of section 717 via section 712 Title VII of the Civil Rights Act of 1964 in that said composite of actions, as described in the complaint currently before this court, were in violation of the constitutional rights of a totally and permanently disabled veteran.

Federal employment discrimination clearly violated the Constitution before the passage of the 1972 Act. Brown v. General Services Administration, at 1964 (Citing Bolling v. Sharpe, 74 S. Ct. 695 (1954)). Section 712 of Title VII did originate under the 1964 Civil Rights Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes". Brown v. General Services Administration, 96 S. Ct. at 1968. Section 717 of Title VII leaves undisturbed whatever remedies Blough might otherwise possess. Davis v. Passman, 96 S. Ct. at 2278. As in the case of Brooks v. United States, 69 S. Ct. 918 (1949), it would be absurd to believe congress did not have the Constitutional rights of veterans in mind when they passed section 712 Title VII of the Civil Rights Act of 1964 and a reading of the entire Act reflects upon such an objective and policy. Blough is therefore permitted to pursue his rights under both Title VII and any other law creating a special right as a totally and permanently disabled veteran.

The constitutional violations of Blough's rights by the United States Government were invidious in nature and so unjustifiable as to be violative of due process under United States v. Gilman, 74 S. Ct. 695 (1954) and subject to challenge under Washington v. Davis, 96 S. Ct. 2040 (1996).

At page seven of the instant motion for summary judgment, Government provides the following statement:

"In Brown v. General Servs. Admin., 425 U.S. 820, 835 (1976), the Supreme Court held that Title VII of the Civil Rights Act of 1964 ' provides the exclusive judicial remedy for claims of discrimination in federal employment.'" The Government did also claim this

exception in Government's motion in opposition to Blough's motion to amend the initial complaint to include a claim of Constitutional tort (R1-10-97SR).

Government has incorrectly stated the conclusions by the Supreme Court in that the Court determined that **section 717** of Title VII of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment. Brown v. General Services Administration, 96 S. Ct. at 1969. The distinction is very important in that **section 712** of Title VII of the Civil Rights Act of 1964, as originally passed by Congress, does provide an important exception to the judicial restrictions of section 717 as recognized by the Supreme Court in Brown v. General Services Administration, supra.

The exception to section 717 under section 712 of Title VII of the Civil Rights Act of 1964 will require an affirmative ruling by the court regarding the following legal questions:

1. Do totally and permanently disabled veterans have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

2. "Nothing contained in this title shall be construed to repeal or modify any *Federal*, State, territorial, or local *law creating special rights* or preference *for veterans.*" Section 712 of the Civil Rights Act of 1964. Does recognition of the constitutional right referenced above provide a *special right* directed to totally and permanently disabled veterans in the employ of the United States Government ?

The following consideration are presented to the court in support of an affirmative response to the legal questions presented above.

Confirmation of Blough's status as totally and permanently disabled veteran in correspondence from the Department of Veterans Affairs (R1-10-25SR).

The Federal Government, in its capacity as an employer, determined to take the lead in such a program. The Veterans' Preference Act was accordingly adopted, creating special preferences and protection for returning veterans at every stage of federal employment. Mitchell v. Cohen, 68 S. Ct. 518 (1948).

The first comprehensive federal veterans' statute was enacted in the Veterans' Preference Act of 1944, 58 Stat 387. The Federal Government has, however engaged in preferential hiring of veterans, through official policies and various special laws, since the Civil War. Personnel Adm'r of Massachusetts v. Feeney, 99 S. Ct. 2282 (1979). The protection afforded the special rights and preferences for veterans under section 712 of Title VII of the Civil Rights Act of 1964 from constitutional challenge was recognized by the Supreme Court in Personnel Adm'r of Massachusetts v. Feeney, at 2286.

U.S.C. Title 5 sections 2108 and 3502 provide special considerations to disabled veterans upon entering and retaining employment with the Federal Government. U.S.C. Title 38 provides an extensive array of benefits available to disabled veterans including healthcare, education, housing assistance, clothing allowance, car allowance,

compensation for service connected injuries, insurance, etc.

Section 403 of the Vietnam Era Veterans' Readjustment Assistance Act , 38 U.S.C. section 4214, provides at (a)(1):

"It is, therefore, the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for disabled veterans and certain veterans of the Vietnam Era."

Based upon the standards established by the United States Supreme Court in Washington v. Glucksberg 117 S. Ct. 2258, 2269 (1997), Blough has a fundamental and constitutionally protected liberty interest which prohibits continuous **acts** of employment related threats of physical injury, discrimination and retaliation by the same **government** which put him in harms way in Vietnam.

The United States Government has violated the constitutional rights of an American who became disabled in the service of his country. Blough has a constitutional right to be free from and to obtain judicial relief for unjustified intrusions on personal security in the employ of the United States Government. Ingraham v. Wright, 97 S. Ct. 1401, 1413 (1977). Based upon the federal employment benefits extended to disabled veterans by Congress, Blough's expectation of process was justifiable and did rise to the level of a constitutionally protected liberty interest. United States v. Stead, 740 F.2d 657 (8th Cir. 1984).

Section 712 of Title VII Civil Rights Act of 1964 was born of the United States Constitution and Congress did by statute bridge the gap between said Act and the Constitution. No provision of Title VII may restrict a veterans constitutional rights and the courts, not legislative bodies, are charged with the duty to interpret the legitimate rights of veterans under the Constitution of the United States.

The section 717 restriction on remedy was **inferred** by the United States Supreme Court in *Brown v. General Service Administration*; however the language of section 712 of Title VII is **explicit**, **unambiguous** and **unchanged** since Congressional enactment.

Reliance by the Government on *Brown v. General Service Administration*, is misplaced based upon the express provision of Congress under section 712 of Title VII of the Civil Rights Act of 1964 and the findings by the United States Supreme Court that discrimination by the United States Government may be so unfair as to violate Fifth Amendment rights.

Section 712 of Title VII of the Civil Rights Act of 1964 provides that Title VII is not the exclusive remedy for a veteran who in this case has been recognized by the United States Government as service connected in a state of permanent and total disability. The fact said veteran is an employee of the United States Government should not deprive him of his constitutional rights.

Section 712 of Title VII was not referenced in *Brown v. General Service Administration* nor *Porter v. Adams* and therefore was not a fact in consideration by the respective courts.

The Procedural-Due-Process Violation Presented as Issue Number Three:

"Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner." Boddie v. Connecticut, 91 S. Ct. , 780, 784 (1971).

"It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system." Boddie, supra at 784.

"Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. What the Constitution does require is 'an *opportunity* * * * granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo, 85 S. Ct. 1187 (1965),* 'for [a] hearing appropriate to the nature of the case. In short, ' within the limits of practicability,' a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. Boddie, supra at 786 (citing Mullane v. Central Hanover Bank & Trust Co, 70 S. Ct. 652, 657 (1950).

"In our judgment, the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order, in effect, denied

the respondent a hearing. It is alleged that he was in the position of an alien enemy and hence could have no locus standi in that forum. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact, and of the right administration of justice." McVeigh v. U.S., 11 Wall. 259, 267.

"The principal, stated in this terse language, lies at the foundation of all well-ordered systems of jurisprudence. Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is the principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." Windsor v. McVeigh, 93 U.S. 277, 278.

"Not only does the word 'deprive' in the Due Process Clause connote more that a negligent act, but we should not 'open the federal courts to lawsuits where there has no affirmative abuse of power'. Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property. By requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, it services to prevent governmental power from being used for purposes of oppression. More important, the difference between one end of the spectrum -

negligence - an dthe other - intent- is abundantly clear." Daniels v. Williams, 106 S. Ct. 662, 665 (1986) (citing Parratt v. Taylor, 101 S. Ct. 1908 (1981)).

"The hearing, moreover, must be a real one, not a sham or a pretense. Palko v. State of Connecticut, 302 U.S. 319 (1937) (citing Moore v.Dempsey, 43 S. Ct. 265 and Mooney v. Holohan, 55 S. Ct. 340).

"Due Process Claim. The government may not deprive any person of 'life, liberty or property without due process of law'. U.S. Const. amend. To prevail upon its procedural due process claim, BJC must establish: (1) a constitutionally protected interest in life, liberty or property; (2) **government deprivation of that interest** ; and (3) **the constitutional inadequacy of procedures accompanying the deprivation** (emphasis added)." Bank of Jackson County v. Cherry, 980 F.2d 1362 (11th Cir. 1993) (citing Lehr v. Robertson, 103 S. Ct. 2985, 2990 (1983)).

"Judgment on the merits is conclusive, and bars subsequent action between same parties on the same question, claim, or demand, and also concludes parties on different claim or demand which involves same question as litigated in original action." United States v. Moser, 45 S. Ct. 66 (1924).

"A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ....' *Souther Pacific R. Co. v. United States*, 18 S. Ct. (1897). Under res judicata, a final judgment on the merits bars further claims by the parties or their privies based on the same cause of

action. *Cromwell v. County of Sac*, 94 U.S. 351 (1877). Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. *Southern Pacific R. Co., supra*, at 27. **To preclude parties from contesting matters that they have had a full and fair opportunity to litigate** (emphasis added) protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. U.S., 99 S. Ct. 970 (1979).

"**The purpose behind the doctrine of res judicata is that the 'full and fair opportunity to litigate** (emphasis added) protects [a party's] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial actions by minimizing the possibility of inconsistent decisions.' Ragsdale v. Rubbermaid., 193 F.3d 1235, 1238 (11th Cir. 1999) (quoting Montana, supra). Res judicata bars the filing of claims which were raised or could have been raised in an earlier proceeding. *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498 (11th Cir. 1990).

"Under Eleventh Circuit precedent, a claim will be barred by prior litigation if all four of the following elements are present: (1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases." Ragsdale, supra at 1238.

"In the Eleventh Circuit, '[t]he principal test for determining whether the causes of action are the same is whether the primary right and duty are the

same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form'. 'It is now said, in general, that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as the former action, that the two cases are really the same 'claim or cause of action' for purposes of res judicata". Ragsdale, 193 F.3d at 1239 (quoting Citibank, supra).

"We must [therefore] look to the factual issues to be resolved [in Rubbermaid II], and compare them with the issues explored in Rubbermaid I. *Id.* Did they arise out of the same transaction or series of transactions ? Could Miller have brought his retaliation claim when he brought his *qui tam* claim ?" Ragsdale, 193 F3d. at 1239.

The Supreme Court, Mr. Justice White, held that standards applicable to equal employment opportunity cases should not have been applied in resolving issue whether the test violated due process clause of the Fifth Amendment. Washington v. Davis, 96 S. Ct. 2040 (**Decided June 7, 1976).**

Allegations of assault and battery and use of excessive force are sufficient to state a constitutional violation when such actions were severe.
See, e.g., Jones v. Hildebrant, 97 S. Ct. 2283, 2287 (1997).

The thrust of Rule 15 of the Federal Rules of Civil Procedure is to reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings. Conley v. Gibson, 78 S. Ct. 99, 103 (1957).

"We are of the opinion that the amendment was properly permitted. Rule 15(c) of the Federal Rules of

Civil Procedure .... provides that "Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleadings." Tiller v. Atlantic Coast Line R. Co., 65 S. Ct. 421, 424 (1945). "The grant or denial of an opportunity to amend pleadings pursuant to Federal Civil Procedure Rule 15(a) is within the discretion of the Federal District Court, but outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion, and is merely abuse of discretion and is inconsistent with the spirit of the Federal Rules."Foman v. Davis, 83 S. Ct. at 224 (1962).

"In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. " Murphy v. Hunt, 102 S. Ct. at 1183 (1982) (United States Parole Comm'n v. Geraghty, 100 S. Ct. at 1208 (1980)). "The District Court *cannot*, in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of section 1291. But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. Sears, Roebuck and Co. v. Mackey, 76 S. Ct. 895, 900 (1956).

THE ACTIONS OF THE RESPECTIVE COURTS CONSTITUTE AN ABUSE OF POWER IN THE DENIAL OF A FULL AND FAIR OPPORTUNITY TO LITIGATE A COMPLAINT OF CONSTITUTIONAL TORT BY THE UNITED STATES GOVERNMENT. THE VIOLATION OF BLOUGH'S FIFTH AMENDMENT RIGHT TO PROCEDURAL DUE PROCESS REFLECTS DISPARATE TREATMENT

BASED UPON PRO SE STATUS AND IS UNCONSTITUTIONAL.

"A fundamental requirement of due process is 'the opportunity to be heard.' Grannis v. Ordean, 34 S. Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only-that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have been granted. Armstrong v. Manzo, 85 S. Ct. 1187, 1191 (1965).

The following statement was presented by Blough at page two of the complaint of constitutional rights violations currently before this court(R1-1):

The Court did fail to address the specific allegations of Constitutional rights violations which **were presented as an amendment** to the above referenced Complaint of civil rights violations. "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." Washington v. Davis, 96 S. Ct. 2040 (1976). **This Court has not addressed the merits in this Complaint under the 'constitutional standards' required by the United States Supreme Court in** *Washington v. Davis, supra.*

The decisions in Montana v. United States, 99 S. Ct. 970 (1979) and Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235 (11th Cir. 1999) were based upon the premise, **before any other considerations**, that the relevant party has **"had a full and fair opportunity to**

litigate". The facts and documentation as presented in the response to Government's motion for summary judgment clearly reflect the fact that Blough **was denied** the opportunity to litigate the constitutional rights violations presented in the prior litigation. The Courts did not consider the motions to amend the initial civil rights complaint to include a claim of constitutional tort.

The court and the Government were advised of the claim of constitutional tort during the course of the preliminary injunction hearing (R1-10-32SR), by motion to amend (R1-10-97SR, 99SR, 104SR) which was properly and timely filed with the court three weeks before the court permitted Blough to amend the initial complaint to bring action under the Rehabilitation Act of 1973 (R1-10-102SR, 106SR), and in Blough's response to Government's motion for summary judgment (R1-10-107SR).

The Order of the court granting Government's motion for summary judgment (R1-10-111SR) does address the amendment to the initial complaint to bring action under the Rehabilitation Act of 1973; however is silent as to the motion to amend for constitutional tort. Blough did attempt to revive, at the appellate court level, the amendment to claim of constitutional tort; however the appellate court also failed to provide comment.

The United States Supreme Court did recognize in Washington v. Davis, 96 S. Ct. 2040 (1976) that the judicial standards applicable to equal employment opportunity cases should not be applied in resolving issues under the due process clause of the Fifth Amendment. Washington v. Davis, supra. was decided six days after Brown v. General Services Administration, 96 S. Ct. 1961 (1976) indicating that the Supreme Court had reviewed the judicial

standards required in Title VII versus Fifth Amendment claims.

The court did rule in the prior litigation upon the motion to amend the initial complaint to bring action under the Rehabilitation Act of 1973 in that the determination was consistent with the decision in the alleged violation under Title VII (R1-10-111SR) (i.e. the judicial standards for review were compatible). A final decision on the motion to amend the initial complaint to include a claim of constitutional tort was not addressed by the court in that; although discovery was complete and the proposed amendment and the initial complaint did involve the same parties and the same nucleus of operative fact, a decision by the court would have required an analysis based upon judicial standards which differed from those presented in the Title VII and Rehab Act claims. The issues proposed by the amended claim of constitutional tort were legal and required no additional discovery to posture them for adjudication.

Blough was denied the opportunity to be heard on the claim of constitutional tort in the initial litigation as required by the due process clause of the Fifth Amendment, United States v. Moser, 45, S. Ct. 66 (1924), and Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235 (11th Cir. 1999). The question of constitutional tort and a final judgment on the merits have not been determined by a court of competent jurisdiction as required by Southern Pacific R. Co. v. United States, 18 S. Ct. 18 (1897).

Government's motion for summary judgment is correct in that A) the initial complaint of civil rights violations, B) the motion to amend said initial complaint to include a claim of constitutional tort, and C) the complaint of constitutional tort before this court involve the same parties and the same nucleus

of operative fact; however the Government is incorrect in that no final judgment on the merits of the claim of constitutional rights violations has been rendered by a court of competent jurisdiction as required by Ragsdale, supra. The district court cannot treat as "final", that which is not "final" within the meaning of section 1291. Sears, Roebusk and Co. v. MacKey, 76 S. Ct. 895, 900 (1956).

As the United States Court of Appeals for the Eight Circuit did observe in Kelsey v. State of Minn., 565, F.2d 503 (1977); the amended complaint was not considered by the court and Blough is free to file a new action alleging the claims of constitutional rights violations which were alleged in the amended complaint (R1-10-97SR, 99SR, 104SR) which were timely filed in the prior litigation.

CONCLUSION

In *McKinney v. Missouri-Kansas-Texas Railroad Co.* a veteran did assert "special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the Armed Forces" and the United States Supreme Court did grant certiorari "because of the importance of the question presented in the administration of the statute and the protection of veterans rights thereunder". McKinney v. Missouri-Kansas-Texas Railroad Co., 78 S. Ct. 1222, 1225 (1958).

It is suggested to the court that the legitimate governmental objective procedurally denied by the respective courts in issue number three is the private interest in a federal special right for totally and permanently disabled veterans denied by the United States Government in issues number one and two.

This is a complaint of constitutional tort for **actions by the United States Government** which were egregious and continuous in nature. Said actions were the direct result of an abusive institutional environment which did promote, and failed to provide a venue for relief from said actions.

The United States Government cannot create and actively condone a work environment in which a disabled veteran is threatened with physical harm on multiple occasions, harassed and retaliated against for reporting the threats, and then informed by the United States Government that because he was not physically injured he has no claim to relief. The facts in support of the unconstitutional governmental actions were well documented and supported by third-party testimony in the previous litigation.

Blough believes the alleged constitutional rights violations are worthy of review by the United States Supreme Court based upon consideration of the Supreme Court's decision in *Brown v. General Services Administration, supra,*. 96 S. Ct. at 1968. Based upon the facts specific to this complaint, there is an obvious conflict between the Supreme Courts **implied** judicial restrictions associated with actions under section 717 and the **explicit** exception provided under section 712 of Title VII of the Civil Rights Act of 1964, as amended.

The record clearly indicates that Blough did raise the claim of Constitutional tort based on the Fifth Amendment in the prior litigation (R1-10-1SR, 32SR, 97SR, 99SR, 104SR) . The purpose in Rule 15(a) of the Federal Rules of Civil Procedure is to afford the injured party the full and fair opportunity to be heard. The abuse of power by the United States District Court for the Middle District of Florida Tampa Division

and the United States Court of Appeals for the Eleventh Circuit in the denial of Blough's right to a "full and fair opportunity to litigate" the alleged constitutional rights violations is subject to remedy in the current litigation.

WHEREFORE, Blough respectfully requests that the court defer to the United States Supreme Court to resolve the issues presented in that they reflect questions of law which are of national significance in addressing the constitutional rights of totally and permanently disabled veterans in the employ of the United States Government.

Respectfully submitted under penalty of perjury this twenty-third day of January, 2001.

"S/Melvin E. Blough" pro se

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CERTIFICATE OF TYPE SIZE AND STYLE

Appellant certifies that 14 point Times New Roman font is used in this brief.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Appellant certifies that this brief contains (limit 11,286) words.

CERTIFICATE OF SERVICE

I hereby certified under penalty of perjury that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Todd Bradshaw Grandy this twenty-third day of January, 2001.

"S/Melvin E. Blough" pro se

RECORD EXCERPTS

TO THE BRIEF FOR APPELLANT

00-16546-F

IN THE

United States Court of Appeals Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF THE TREASURY,
Secretary of the Treasury,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION (D.C. Docket NO.: 00-1631 CV-T-26E)

INDEX

TITLE OF DOCUMENT	EXHIBIT/ DOCUMENT*
District court docket sheets: case under appeal (case number 00-1631-CV-T-26E)	A**
Complaint of constitutional tort	1
Answer to complaint	8
Plaintiff's response to defendant's motion for summary judgment	10
Order granting summary judgment to defendant	11
District court docket sheets: prior litigation (case number 98-1358-CV-T-24E)	B**
Initial complaint under Title VII of the Civil Rights Act of 1964	1
Motion to amend initial complaint to include claim Constitutional Rights violation	97
Defendant's response to motion #97	99

*Document numbers correspond to district court docket sheet in complaint of constitutional tort currently upon appeal to this court.

**Document numbers correspond to district court docket sheet number in initial claim of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended.

TITLE OF DOCUMENT	EXHIBIT/ DOCUMENT
Order granting motion to file memo in support #33 motion	102
Plaintiff's motion in support of motion #97	104
Plaintiff's motion for trial by jury	105
Memorandum in support motion #33	106
Plaintiff's response to motion for summary judgment	107
Order granting summary judgment to defendant	111
Appeal to the United States Court of Appeals Eleventh Circuit in prior litigation (case number 99-2435-FF/99-13735-FF)	C

**Document numbers correspond to district court docket sheet number in initial claim of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended.

**Copies of the documents listed above (with the exception of Doc. No. 105) were initially included within item number ten of the case currently on appeal to this court. Blough has secured and

provided certified copies of these specific documents which were not available at time of Blough's response to motion for summary judgment.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Todd Bradshaw Grandy this twenty-third day of January, 2001.

"S/Melvin E. Blough" pro se

00-16546-F

IN THE

United States Court of Appeals Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE TREASURY, PAUL H. O'NEILL, Secretary of the Treasury,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION (D.C. Docket NO.: 00-1631 CV-T-26E)

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Citations and Authorities	ii-iv
Arguments and Citations of Authority	1 - 15
Conclusion	15
Certificate of Service	16

TABLE OF CITATIONS AND AUTHORITIES

Cases	Page
Allen v. McCurry, 101 S. Ct. 411 (1980)	14
Armstrong v. Manzo, 85 S. Ct. 1187 (1965)	14
Baldwin County Welcome Center v. Brown, 104 S. Ct. 1723 *	12, 14
Boddie v. Connecticut, 91 S. Ct. 780 (1971) *	14
Bolling v. Sharpe, 74 S. Ct. 695 (1954) *	10
Brooks v. United States, 69 S. Ct. 918 (1949)	10
Brown v. General Services Administration, 96 S. Ct. 1961 (1976) *	1, 2, 8, 9, 10, 11 12
Bulova Watch Co. v. United States, 81 S. Ct. 864 (1961)	6
Cafeteria & Res. Workers Union v. McElroy, 81 S. Ct. 1743 (1961)	15
Conley v. Gibson, 78 S. Ct. 99 (1957) *	13, 14
Coon v. Georgia Pacific Corp., 11th Cir. 829 F.2d 1563 (1987) *	13, 14
Daniels v. Williams, 106 S. Ct. 662 (1986)	15
Davis v. Passman, 99 S. Ct. 2264 (1979)	9, 10

Fourco Glass Co. v. Transmirra Products Corp.,
77 S. Ct. 787 (1957) 6

Grannis v. Ordean, 34 S. Ct. 779 14

Harris v. McRae, 100 S. Ct. 2671 (1980) 1, 2

Hooper v. Bernalillo County Assessor,
105 S. Ct. 2862 (1985) 7

Ingraham v. Wright, 97 S. Ct. 1401 (1977) * 10

Johnson v. Railway Express Agency,
95 S. Ct. 1716 (1975) 8

McGowan v. States of Maryland,
81 S. Ct. 1101 (1961) 7

Montana v. United States,
99 S. Ct. 970 (1979) * 14

Morton v. Mancari,
94 S. Ct. 2474 (1974) * 5, 6, 7,

Parham v. J.R., 99 S. Ct. 2493 (1979) 2

Personnel Adm'r of Mass. v. Feeney,
99 S. Ct. 2282 (1979) 3

Porter v. Adams, CA 5th Cir,
639 F.2d 273 (1981) 9, 11

Ragsdale v. Rubbermaid, Inc.,
11th Cir. 193 F.3d 1235 (1999) * 14

Regan v. Taxation With Rep. of Washington,
103 S. Ct. 1997 (1983)* 7

Richards v. United States,
82 S. Ct. 585 (1962) 4

Siegert v. Gilley, 111 S. Ct. 1789 (1991) 1

Spector Motor Service, Inc. v. McLaughlin,
65 S. Ct. 152 1

United States v. Borden Co.,
60 S. Ct. 182 (1939) 6

United States v. Congr essof Industrial Org,
68 S. Ct. 1349 (1948)* 3

United States v. Gilman, 74 S. Ct. 695 (1954) * 10

United States v. Stead,
8th Cir. 740 F.2d 657 (1984) * 10

United Steelworkers, Etc. v. Weber,
99 S. Ct. 2721 (1979) 5

Washington v. Davis, 96 S. Ct. 2040 (1996) * 10

Washington v. Glucksberg,
117 S. Ct. 2258 (1997) * 9, 13

OTHER AUTHORITIES:

Public Law 78-359 Veterans
Preference Act of 1944 * 4

Public Law 88-352 Civil Rights Act of 1964 * 4-15

Title VII of the Civil Rights Act of 1964,
as amended * 1-15

ARGUMENTS AND CITATIONS OF AUTHORITY

ISSUE NUMBER ONE OF APPELLANT'S BRIEF

Do totally and permanently disabled veterans have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

Appellee's (hereafter Government) brief is silent as to issue number one. This is consistent with the non-response to this issue by the Government, the district court and the appellate court in the current and prior litigation R1-8/ R1-10-32SR page 17, 99SR, 111SR, Ex. B SR/ R1-11) This issue was initially presented by Appellant (hereafter Blough) in the course of a district court hearing (R1-10-32SR page 17) in the prior litigation, in the motion to amend the complaint in the initial litigation (R1-10-97SR), in the brief/reply brief/petition for rehearing en banc of the appeal in the initial litigation (Exhibit C record excerpts), in the complaint as filed in the current litigation (R1-1 page 4), and in response to Government's motion for summary judgment in both the prior and current litigation (R1-10-107SR page 22 and R1-10 page 14).

The silence of the Government and the respective courts is attributed to the conclusion that Blough's claim of constitutional tort, as stated above, is merged into the Title VII claim under the rationale of Brown v. General Services Administration, 96 S. Ct. 1961 (1976) and the following judicial instruction by the United States Supreme Court:

> "It is well settled that if a case may be decided on either statutory or constitutional grounds, this Court, for sound jurisprudential reasons, will

> inquire first into the statutory question. This practice reflects the deeply rooted doctrine 'that we ought not to pass on questions of constitutionally ..... unless such adjudication is unavoidable.'" Harris v. McRae, 100 S. Ct. 2671, 2683 (1980) (citing Spector Motor Service,Inc. v. McLaughlin, 65 S. Ct. 152.

Blough suggests to the court that the analytical structure under which this claim of constitutional tort should be addressed is most accurately presented in *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991) as opposed to *Harris v. McRae*, supra, in that the adjudication of the constitutional right asserted is determinative of the **special right** of exception under the statute (Title VII section 712 of the Civil Rights Act of 1964) presented as issue number two and the proper evaluation of the adequacy of due process as presented as issue number three in that "what process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made." Parham v. J.R., 99 S. Ct. 2493, 2507 (1979).

The failure of the Government and the courts to address the claim of constitutional tort based upon the judicial instruction of *Harris v. McRae*, supra, and Supreme Court's decision in *Brown v. General Services Administration*, supra, goes beyond "putting the cart before the horse" and in fact removes the horse from the cart. As discussed below at issue number two; the statutory exclusion provision of section 712 of Title VII of the Civil Rights Act of 1964, as amended, is compatible with the restrictions of section 717 of said Act. It is the blanket **exclusive remedy** of section 717 of the Act as **inferred** by the United States Supreme Court in *Brown v. General Services Administration*, supra, which is challenged based upon facts specific to this case. The asserted constitutional right must be recognized to fairly challenge as a

s**pecial constitutional right** under Title VII section 712 of the Civil Rights Act of 1964, as amended, providing exception to the Supreme Courts inferred restriction in *Brown v. General Services Administration*, supra. This is a case of first impression in that the exception of section 712 Title VII of the Civil Rights Act of 1964 has never been litigated.

ISSUE NUMBER TWO OF APPELLANT' BRIEF

Does recognition of the constitutional right as stated in issue number one above; provide a *special right* (under Title VII section 712 of the Civil Rights Act of 1964) of exception to the exclusive judicial remedy inferred by the United States Supreme Court in *Brown v. General Services Administration* ?

Government's response is limited to the statement that "nothing in section 712, itself, however creates additional special rights or preference for veterans".

Blough disputes the Government's response upon consideration of the following analysis of historical and legal exceptions which are based upon specific constitutional obligations of the United States Government:

The purpose of Congress is a dominant factor in determining meaning of a statute. There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments. Nor, where doubt exists, should we disregard informed congressional discussion. United States v. Congress of Industrial Organizations, 68 S. Ct. 1349, 1352 (1948).

The following statement was presented within the closing address by the Speaker of the House of Representatives on March 3, 1865 and reported in The Congressional Globe. On said date the respective House did pass Resolution No. 27 to encourage preferential employment of disabled and discharged soldiers:

> "May I not remind you that the widow and the fatherless, the maimed and the wounded, the diseased and the suffering, whose anguish springs from this great contest, **have claims on all of us** (emphasis added), heightened immeasurably by the sacred cause for which they have given so much" ?

The first comprehensive federal veterans' statute was enacted in the Veterans' Preference Act of 1944, 58 Stat 387. The Federal Government has, however engaged in preferential hiring of veterans, through official policies and various special laws, since the Civil War. Personnel Adm'r of Massachusetts v. Feeney, 99 S. Ct. 2282 (1979). The protection afforded the special rights and preferences for veterans under section 712 of Title VII of the Civil Rights Act of 1964 from constitutional challenge was recognized by the Supreme Court in Personnel Adm'r of Massachusetts v. Feeney, at 2286.

The following statement by Representative Starnes appears in the Congressional Record of April 17, 1944 in regard to the Veterans' Preference Act of 1944:

> "From the very inception of our Republic our Government has extended certain special benefits and privileges to the men who have offered their lives in defense of the country and its institutions. This is a sound principle."

Public Law 78-359

"Veterans' Preference Act of 1944"

Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and **this Act shall not be construed to take away from the preference eligible any rights** heretofore granted to, or **possessed by**, **him under any existing law**, Executive order, civil-service rule or regulation, **of any department of the Government** or officer thereof (emphasis added).

"We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibilities in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provision of the whole law, and to its object and policy." Richards v. United States, 82 S. Ct. 585, 591 (1962).

The following statement by Senator McCarthy appears in the Congressional Record of June 19, 1964 in regard to the Civil Rights Act of 1964:

> "The moral basis of these civil rights and of this pending civil rights bill is expressed most clearly in the Declaration of Independence and in the Constitution and affirmatively included in the moral and religious principles which the great majority of the citizens of the United States have accepted and do accept."

Public Law 88-352

"Civil Rights Act of 1964"

TITLE VII---EQUAL EMPLOYMENT OPPORTUNITY

DISCRIMINATION BECAUSE OF .....NATIONAL ORIGIN

Sec. 703 (i). Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

VETERANS' PREFERENCE

Sec. 712. **Nothing contained in this title shall be construed to repeal or modify any Federal**, State, territorial, or local **law creating special rights or preference for veterans (**emphasis added).

In extending the general anti-discrimination machinery to federal employment with the 1972 addition of section 717 to the Civil Rights Act of 1964 , Congress in no way modified the public employment preferences within the Bureau of Indian Affairs (agency of the Federal Government), as provided by the Indian Reorganization Act of 1934, which were built into the 1964 Civil Rights Act. Morton v. Mancari, 94 S. Ct. 2474, 2481 (1974).

In extending the general anti-discrimination machinery to federal employment with the 1972 addition of section 717 to the Civil Rights Act of 1964 , Congress in no way modified the public employment preferences within the Federal Government as provided by the Veterans Preference Act of 1944,

which were built into the 1964 Civil Rights Act under section 712.

The federal policy of according hiring preference to Indians is a longstanding policy dating back to 1834 and an important component of the Government's Indian program. The anti-discrimination provision of Title VII of the 1964 Civil Rights Act, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different problem. Morton, supra, at 2482.

Title VII was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth Amendment. United Steelworkers, Etc. v. Weber, 99 S. Ct. 2721, 2729 (1979).

The federal policy of according hiring preference to disabled veterans is a longstanding policy dating back to 1865 and an important component of the Government's program directed to disabled veterans. The anti-discrimination provision of Title VII of the 1964 Civil Rights Act, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different problem.

Three months after Congress passed the 1972 amendments to the Civil Rights Act of 1964, it enacted two *new* Indian preference laws. The intention of the legislature to repeal "must be clear and manifest". *United States v. Borden Co.*, 60 S. Ct. 182, 188 (1939). In light of the factors indicating no repeal, the Supreme Court did not conclude that Congress consciously abandoned its policy of furthering Indian self-government when it passed the 1972 amendments. Morton, supra, at 2483.

In the same year that Congress passed the 1972 amendments to the Civil Rights Act of 1964, it enacted The Vietnam Era Veterans' Readjustment Assistance Act (Public Law 92-540) "promoting the maximum of employment and job advancement opportunities within the Federal Government for disabled veterans and certain veterans of the Vietnam Era." In light of the factors indicating no repeal, it is obvious that Congress did not abandon its policy of furthering the interests of disabled veterans when it passed the 1972 amendments to the Civil Rights Act of 1964.

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' Ginsberg & Sons v. Popkin, 52 S. Ct. 322." Fourco Glass Co. v. Transmirra Products Corp., 77 S. Ct. 787, 791 (1957).

The Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. *Bulova Watch Co. v. United States*, 81 S. Ct. 864 (1961). Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. Morton, supra, at 2483.

The Federal preference statute under section 712 Title VII of the Civil Rights Act of 1964 is based upon the Veterans' Preference Act of 1944. Preferences are clearly defined; however the **rights** of veterans are not defined; although provided for in both Acts. Section 717 Title VII of the 1964 Civil Rights Act, as amended, is of general application. Here, the **rights** and

preferences provided to veterans by Congress are reasonably and directly related to a legitimate, nondiscriminatory obligation of the United States Government. As with the American Indians; said obligation to totally and permanently disabled veterans is of constitutional stature.

"Generally, a law will survive scrutiny under the equal protection clause if the distinction rationally furthers a legitimate state purpose." Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985).

The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution under Article I, section 8, clause 3. If every piece of legislation providing special treatment for tribal Indians were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments (preferential treatment under the Civil Rights Act of 1964) will not be disturbed. Morton, supra, at 2485.

Generally, statutory classifications are valid if they bear a rational relationship to a legitimate governmental purpose. Statutes are subject to a higher level of scrutiny if they interfere with the exercise of a fundamental right ..... . Regan v. Taxation With Representation of Washington, 103 S. Ct. 1997, 2001 (1983).

"It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless 'the

classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.' McGowan v. State of Maryland, 81 S. Ct. 1101, 1105 (1961).

The plenary power of Congress to protect the totally and permanently disabled veterans is drawn implicitly from the inherent fundamental liberty interest of said veterans under the Fifth Amendment to the Constitution. It would be irrational to believe that Congress passed legislation in 1972 (i.e. section 717 of Title VII of the Civil Rights Act of 1964) which permitted the United States Government to violate the constitutional rights of totally and permanently disabled veterans in the employ of the United States Government.

Section 717 of Title VII of the Civil Rights Act of 1964, as amended, is not unconstitutional in that Congress did provide protection to the fundamental constitutional rights of totally and permanently disabled veterans via section 712 of the respective Act. If every piece of legislation providing special treatment for disabled veterans were deemed invidious racial discrimination, a portion of one Title of the United States Code (5 U.S.C.) and an entire Title of the United States Code (38 U.S.C.) would be effectively erased and the solemn commitment of the Government towards veterans would be jeopardized. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique constitutional obligation toward veterans, such legislative judgments (preferential treatment under the Civil Rights Act of 1964) will not be disturbed.

"The primary question in this litigation is not difficult to state: Is section 717 of the Civil Rights Act of 1964, as added by section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C.

section 2000e-16 the exclusive individual remedy available to a federal employee complaining of job-related discrimination? But the question is easier to state than it is to resolve. Congress simply failed explicitly to describe section 717's position in the constellation of antidiscrimination law. We must, therefor, infer congressional intent in less obvious ways." Brown v. General Services Administration, 96 S. Ct. 1961 (1976).

"Section 717(a) provides that all personnel actions affecting federal employees and applicants for federal employment 'shall be made free from any discrimination based on race, color, religion, sex, or national origin.'" Brown v. General Services Administration, 96 S. Ct. at 1966.

"The petitioner relies upon our decision in *Johnson v. Railway Express Agency*, 95 S. Ct. 1716 (1975), for the proposition that Title VII did not repeal pre-existing remedies for employment discrimination. In *Johnson* the Court held that in the context of *private employment* Title VII did not pre-empt other remedies. But that decision is inapposite here. In the first place, there were no problems of sovereign immunity in the context of the *Johnson* case. Second, the holding in *Johnson* rested upon the explicit legislative history of the 1964 Act which 'manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.'" 95 S. Ct. at 1719 quoting *Alexander v. Gardner-Denver Co.*, 94 S. Ct. 1011, 1019-20. There is no such legislative history behind the 1972 amendments. Indeed, as indicated above, the congressional understanding was precisely to the contrary. Brown v. General Services Administration, 96 S. Ct. at 1968.

"In the case at bar, as in *Preiser* and the other cases cited above, the established principal leads unerringly to the conclusion that section 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Services Administration, 96 S. Ct. at 1969.

"Because we conclude that section 717 bars reprisals against federal employees who file charges of discrimination, appellant must bring her action under that section." Porter v. Adams, 639 F.2d 273 (U.S.C.A 5th Cir. 3/13/81) (citing Brown v. GSA, 96 S. Ct. at 1969).

"Like the plaintiffs in *Bolling v. Sharp*, supra, petitioner rests her claim directly on the Due Process Clause of the Fifth Amendment. There is in this case 'no *explicit* congressional declaration that persons' in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury." Davis v. Passman, 99 S. Ct. 2264, 2276, 2278 (1979) (citing Bivens v. Six Unknown Federal Narcotics Agents, 91 S. Ct. 1999 (1971)). "On the contrary, section 717 leaves undisturbed whatever remedies petitioner might otherwise possess." Davis v. Passman, 96 S. Ct. at 2278.

Section 712 of Title VII of the Civil Rights Act of 1964, as originally passed by Congress, does provide an important exception to the judicial restrictions of section 717 as recognized by the Supreme Court in Brown v. General Services Administration, supra. The exception will require an affirmative ruling by the court regarding issue number one and issue number two as presented.

Based upon the standards established by the United States Supreme Court in Washington v. Glucksberg 117 S. Ct. 2258, 2269 (1997), Blough has a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the same government which put him in harms way in Vietnam.

The actions by the United States Government/ Department of the Treasury are excepted from the judicial restrictions of section 717 via section 712 Title VII of the Civil Rights Act of 1964 in that said composite of actions, as described in the complaint currently before this court, were in violation of the constitutional rights of a totally and permanently disabled veteran.

Federal employment discrimination clearly violated the Constitution before the passage of the 1972 Act. Brown v. General Services Administration, at 1964 (Citing Bolling v. Sharpe, 74 S. Ct. 695 (1954)). Section 712 of Title VII did originate under the 1964 Civil Rights Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes". Brown v. General Services Administration, 96 S. Ct. at 1968. Section 717 of Title VII leaves undisturbed whatever remedies Blough might otherwise possess. Davis v. Passman, 96 S. Ct. at 2278. As in the case of Brooks v. United States, 69 S. Ct. 918 (1949), it would be absurd to believe congress did not have the Constitutional rights of veterans in mind when they passed section 712 Title VII of the Civil Rights Act of 1964 and a reading of the entire Act reflects upon such an objective and policy. Blough is therefore permitted to pursue his rights under both Title VII

and any other law creating a special right as a totally and permanently disabled veteran.

The constitutional violations of Blough's rights by the United States Government were invidious in nature and so unjustifiable as to be violative of due process under United States v. Gilman, 74 S. Ct. 695 (1954) and subject to challenge under Washington v. Davis, 96 S. Ct. 2040 (1996).

The United States Government has violated the constitutional rights of an American who became disabled in the service of his country. Blough has a constitutional right to be free from and to obtain judicial relief for unjustified intrusions on personal security in the employ of the United States Government. Ingraham v. Wright, 97 S. Ct. 1401, 1413 (1977). Based upon the federal employment benefits extended to disabled veterans by Congress, Blough's expectation of process was justifiable and did rise to the level of a constitutionally protected liberty interest. United States v. Stead, 740 F.2d 657 (8th Cir. 1984).

Section 712 of Title VII Civil Rights Act of 1964 was born of the United States Constitution and Congress did by statute bridge the gap between said Act and the Constitution. No provision of Title VII may restrict a veterans constitutional rights and the courts, not legislative bodies, are charged with the duty to interpret the legitimate rights of veterans under the Constitution of the United States.

The section 717 restriction on remedy was inferred by the United States Supreme Court in *Brown v. General Services Administration*; however the language of section 712 of Title VII is explicit and unchanged since Congressional enactment.

Section 712 of Title VII of the Civil Rights Act of 1964 provides that section 717 is not the exclusive remedy for a veteran who in this case has been recognized by the United States Government as service connected in a state of permanent and total disability. The fact said veteran is an employee of the United States Government should not deprive him of his constitutional rights.

As previously stated, section 717 of Title VII of the Civil Rights Act of 1964, as amended, is not unconstitutional in that Congress did provide protection to the fundamental constitutional rights of totally and permanently disabled veterans via section 712 of the respective Act. The inferred judicial limitations of section 717 as stated by the Supreme Court in *Brown v. General Services Administration* are subject to remedy by the Supreme Court. Section 712 of Title VII was not referenced in *Brown v. General Services Administration nor Porter v. Adams*, supra, and therefore was not a fact in consideration by the respective courts. No Federal court has considered the section 712 exception as presented.

Issue number two was initially presented by Blough in the motion to amend the complaint in the prior litigation (R1-10-97SR), in the brief/reply brief/petition for rehearing en banc of the appeal in the initial litigation (Exhibit C record excerpts), and in response to Government's motion for summary judgment in the current litigation (R1-10 page 8). The district court and the appellate court were non-responsive to this issue in the current and prior litigation.

ISSUE NUMBER THREE OF APPELLANT'S BRIEF

The United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit did not consider Appellant's (hereafter Blough) pleadings in the prior litigation and have applied the doctrine of res judicata to the current litigation. The actions of the respective Courts constitute an abuse of power in the denial of a full and fair opportunity to litigate a Complaint of Constitutional tort by the United States Government. The violation of Blough's Fifth Amendment right to procedural due process reflects disparate treatment and is unconstitutional.

Government's brief provides no comment relative to the specific documentation presented in Blough's appeal. The essence of Government's unsupported argument is that Blough failed to plead his Fifth Amendment claim in the prior litigation. The following facts are improperly stated in Government's brief:

1. The basis for the complaint is misstated (R1-1).

2. (Page 5) The Government did also argue on summary judgment that Blough's claim was barred by *Brown v. General Services Administration*, supra, (R1-8 page 7).

3. (Page 6) The district court (R1-10-111SR) did not deny Blough's motion to amend (R1-10-97SR) the initial complaint (R1-10-1SR) and this court did not affirm said denial (R1-10 Exhibit C). The appellate court did affirm the denial of the motion to amend complaint to include violations under the 1973 Rehabilitation Act (R1-10-33SR).

"A complaint must contain, *inter alia*, ' a short and plain statement of the claim showing that the pleader is entitled to relief.'" Baldwin County Welcome Center

v. Brown, 104 S. Ct. 1723, 1725 (1984) citing Fed. Rule Civ. Proc. 8(a)(2).

"First, plaintiff's additional claims were not pleaded in her complaint. The sentence in her charge is no more than a general claim on behalf of all women employees. It did not provide notice to the defendants that plaintiff sought recovery based on acts as described in the pretrial stipulation, the 1977 letter, and 1978 charge. Thus, as to her additional claims, the complaint failed to set forth a 'short and plain statement ... showing that the pleader is entitled to relief.' Rule 8(a)(2). *See Uptown People's Community Health Services v. Board of Commissioners of Cook County*, 647 F.2d 727, 729, 739 (7th Cir. 1981) (count in complaint too indefinite; '[w]hile it is true that 'notice pleading' is an integral part of the federal rules governing pleadings, it is still necessary that *something* be stated that apprises a defendant of the substance of the allegation' (emphasis in the original); *Ogletree v. McNamara*, 449 F.2d 93, 98-99 (6th Cir. 1971) ('[s]omething more than [a] conclusory allegation of systematic racial discrimination is required. Some facts as to when, how, to whom, and with what results such discrimination has been applied' are minimum requirements of Rule 8(a)." Coon v. Georgia Pacific Corp., 829 F.2d 1563, 1569 (11th Cir. 1987).

"Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Coon, supra a 1569 (citing Conley v. Gibson, 78 S. Ct. 99, 103 (1957)).

A motion to amend the initial complaint (R1-10-97SR) under Rule 15(a) of the Federal Rules of Civil

Procedure was filed with the district court one month prior to the date on which all briefs were required to be filed. The Government did respond to the court in opposition to said motion (R1-10-99SR). The following notification was provided to the defendant (Government) within plaintiff's (Blough) motion to amend (R1-10-97SR):

> "Plaintiff respectfully requests that the Court grant this request to amend the initial Complaint to include a claim of action against Defendant for deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution.
>
> Jurisdiction is conferred on the Court by 28 U.S.C. section 1331 in that the basis for this amended claim arises under the Federal Constitution.
>
> Title VII of the Civil Rights Act of 1964 is not the exclusive remedy for Plaintiff in that Section 712 of the Act provides that "nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans". Under the analysis presented by the United States Supreme Court in Washington v. Glucksberg, 117 S. Ct. 2258 (1997) ; a one hundred percent (100%) physically disabled veteran has a fundamental Constitutional right not to be threatened, harassed and retaliated against by the same government which put him in harms way in Viet Nam.
>
> The essence of Plaintiff's initial complaint under Title VII is that he has been subject to a continuing series of threats, harassment, intimidation and retaliation as a pretext for

adverse action over an eight year period. Said actions are also the basis in this Fifth Amendment claim."

The notification (R1-10-97SR) provided to defendant (Government) in the initial litigation not only met, but exceeded the requirements of *Baldwin County Welcome Center*, supra, *Coon v. Georgia Pacific Corp.*, supra, and *Conley v. Gibson*, supra. The defendant was apprised of the substance of the allegation and the grounds upon which it rests. The actions describing when, how, to whom, and with what results were spelled out in great detail within the initial complaint (R1-10-1SR) and were "also the basis of this Fifth Amendment claim".

Neither the district court in the initial litigation, this appellate court, nor the district court in the current litigation read Blough's pleadings which clearly referenced the motion to amend the initial complaint (R1-10-97SR) and the Governments opposition (R1-10-99SR). Said motion was referenced in district court initial litigation (R1-10-97SR, 99SR, 104SR, 107SR), appellate court (Record Excerpts C/ Brief pages 2, 7, 8, 11/Reply Brief page 6/Petition for rehearing en banc pages 2, 3, 5), district court current litigation (R1-1 page 2, R1-10 pages 2, 3, 13, 14, R1-10-97SR, 99SR, 104SR, 107SR).

The decisions in Montana v. United States, 99 S. Ct. 970 (1979) and Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235 (11th Cir. 1999) were based upon the premise, **before any other considerations**, that the relevant party has "**had a full and fair opportunity to litigate**". The United States Supreme Court has repeatedly recognized the absolute necessity that the party against whom the earlier decision is asserted must have been afforded a **full and fair opportunity to litigate** that issue in the earlier case. Allen v.

McCurry, 101 S. Ct. 411, 415 (1980). The *opportunity* to be heard is a fundamental requirement of procedural due process. Grannis v. Ordean, 34 S. Ct. 779, 783; Armstrong v. Manzo, 85 S. Ct. 1187, 1191 (1965); Boddie v. Connecticut, 91 S. Ct. 780, 784 (1971). Blough **was denied a full and fair opportunity to litigate** in the earlier case and therefore the doctrine of res judicata does not apply to the current litigation (R1-11).

Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action. Cafeteria & Restaurant Workers Union v. McElroy, 81 S. Ct. 1743, 1748 (1961).

Government contends at page ten of brief that the proper standard of review is for abuse of discretion. Blough continues to believe that the correct standard of review is for abuse of power by the respective district court and the appellate court in the deliberate denial of due process. Daniels v. Williams, 106 S. Ct. 662, 665 (1986). Blough did clearly apprise the respective courts of the claim of constitutional tort in the initial proceedings (R1-10-97SR). The Orders by the respective courts indicate that Blough's pleadings were not reviewed by the respective courts (R1-10-111SR, R1-10-Exhibit B, R1-11). Issue number three is not presented as a matter in dispute between the parties, but rather as an unsettled matter ready for a decision by the United States Supreme Court.

CONCLUSION

WHEREFORE, Blough respectfully requests that this court grant the petition for en banc consideration of

certification under Title 28 U.S.C. section 1254(2) which is pending before this court. This is a case of national significance which addresses the constitutional rights of millions of veterans in the employ of the Federal government and the constitutional right of pro se litigants to due process within the Federal courts.

Respectfully submitted under penalty of perjury this fifteenth day of March, 2001.

"S/Melvin E. Blough" pro se

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Brandon, FL. 33511
(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Susan H. Rothstein-Youakim (Suite 3200, 400 North Tampa Street, Tampa, FL. 33602) this fifteenth day of March, 2001.

"S/Melvin E. Blough" pro se

00-16546-F

IN THE

United States Court of Appeals Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF THE TREASURY,
PAUL H. O'NEILL, Secretary of the Treasuy,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION (D.C. Docket NO.: 00-1631 CV-T -26E)

PETITION FOR EN BANC CONSIDERATION OF CERTIFICATION UNDER TITLE 28 U.S.C. SECTION 1254(2)

MELVIN E. BLOUGH
Pro Se - Appellant
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BLOUGH v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE TREASURY, Secretary of the Treasury

(11th Cir. - No. 00-16546-F)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following listed persons and entities have an interest in the outcome of this case:

1. Paul H. O'Neill, Secretary of the Treasury, defendant-appellee;

2. Melvin E. Blough, plaintiff-appellant, pro se;

3. Susan H. Rothstein-Youakim, Assistant United States Attorney, appellate counsel for United States of America;

4. David P. Rhodes, Assistant United States Attorney, appellate counsel for United States of America;

5. Tamra Phipps, Assistant United States Attorney, Chief, Appellate Division;

6. Donna A. Bucella, United States Attorney;

7. The Honorable Susan C. Bucklew, United States District Judge;

8. The Honorable Richard A. Lazzara, United States District Judge;

9. Circuit Judges Godbold, Roney, Hill, Fay, Kravitch, Clark, Anderson, Tjoflat, Edmondson, Cox, Birch, Dubina, Black, Carnes, Barkett, Hull, Marcus and Wilson to the United States Court of Appeals for the Eleventh Circuit;

10. Todd Bradshaw Grandy, Assistant United States Attorney, district court counsel for the United States of America.

TABLE OF CONTENTS

	Page
Certificate of Interested Persons	(i)
Table of Contents	(ii)
Table of Citations and Authorities	(iii) - (iv)
Statement of issues asserted to merit en banc consideration	1 - 3
Statement of the course of proceeding and disposition of the case	3 - 4
Statement of any facts necessary to argument of the issues	4 - 10
Arguments and citations of authority	10 - 14
Conclusion	14 - 15
Certificate of Service	16

TABLE OF CITATIONS AND AUTHORITIES

	Page
Allen v. McCurry, 101 S. Ct. 411 (1980)	12
Armstrong v. Manzo, 85 S. Ct. 1187 (1965)	12
Boddie v. Connecticut, 91 S. Ct. 780 (1971)	12
Bolling v. Sharpe, 74 S. Ct. 695 (1954)	14
Brooks v. United States, 69 S. Ct. 918 (1949)	14
Brown v. General Services Administration, 96 S. Ct. 1961 (1976)	2, 3, 13, 14, 15
Davis v. Passman, 99 S. Ct. 2264 (1979)	14
Estelle v. Gamble, 97 S. Ct. 285 (1976)	11
Fuentes v. Shevin, 92 S. Ct. 1983, (1972)	3
Grannis v. Ordean, 34 S. Ct. 779	12
Ingraham v. Wright, 97 S. Ct. 1401, (1997)	10
Montana v. United States, 99 S. Ct. 970 (1979)	12
Palko v. State of Connecticut, 302 U.S. 319 (1937)	2, 3
Parham v. J.R., 99 S. Ct. 2493 (1979)	2
Personnel Adm'r of Massachusetts v. Feeney, 99 S. Ct. 2282 (1979)	13
Ragsdale v. Rubbermaid, Inc.,	

193 F.3d 1235 (11th Cir. 1999) 12

Sears, Roebuck and Co. v. MacKey,
76 S. Ct. 895 (1956) 2

Siegert v. Gilley, 111 S. Ct. 1789 (1991) 1

Southern Pacific R. Co. v. United States,
18 S. Ct., 27 (1897) 12

United States v. Gilman, 74 S. Ct. 695 (1954) 10

Washington v. Davis, 96 S. Ct. 2040 (1976) 9, 10

Washington v. Glucksberg,
117 S. Ct. 2258 (1997) 10

Wisniewski v. United States,
77 S. Ct. 633 (1957) 3

Yick Wo v. Hopkins, 6 S. Ct. 1064 (1886) 1

STATEMENT OF ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION OF CERTIFICATION TO THE UNITED STATES SUPREME COURT:

The "national debt" is not measured in dollars, but rather in the number of lives lost and lives crippled in service to America by its veterans. With the exception of those who lost their lives in service to their country; the American public has no greater obligation than to those veterans who became totally and permanently disabled in the service of their country.

A constitutional right is fundamental if it is "preservative of all rights". Yick Wo v. Hopkins, 6 S. Ct. 1064, 1071 (1886). This appeal is unique in that the United States Government/Department of the Treasury and the respective Federal courts have violated and denied a constitutional obligation of "**We the people ...**" to totally and permanently disabled veterans. Inherent to status as a totally and permanently disabled veteran is a fundamental right to due process in the protection of Fifth Amendment liberty interests under the United States Constitution.

The procedural due process violations presented as issues number one and two are unsettled questions of law and factual matter within the court record. The substantive due process violations presented as issues number one and three are questions of law which are in dispute and are properly resolved by the United States Supreme Court based upon Court precedent.

1. "A necessary concomitant to the determination of whether the constitutional right asserted by the plaintiff is 'clearly established' at the time the

defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of the **purely legal question** (emphasis added) permits courts expeditiously to weed out suits which fail the test." Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991).

Do totally and permanently disabled veterans have an inherent fundamental and constitutionally protected Fifth Amendment liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

2. The district court cannot treat as "final", that which is not "final" within the meaning of section 1291. Sears, Roebuck and Co. v. MacKey, 76 S. Ct. 895, 900 (1956).

What process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made. Parham v. J.R., 99 S. Ct. 2493, 2507 (1979).

The United States Government in the capacity of the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit has engaged in the unconstitutional act of denying due process to a totally and permanently disabled veteran in a complaint of constitutional tort by the United States Government. The court record (R1-10, 11) clearly reflects the fact that the respective courts were predetermined to dispose of the complaint at their earliest convenience and did not consider the pleadings as presented by appellant

(hereafter Blough). The actions of the respective courts were in fact a pretense of due process, *Palko v. State of Connecticut*, 302 U.S. 319 (1937), constituting an intentional abuse of judicial power such as to call for an exercise in the supervisory power of the United States Supreme Court.

3. "(Title VII) Section 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. General Services Administration, 96 S. Ct. 1961, 1969 (1976).

"Nothing contained in this title shall be construed to repeal or modify any *Federal*, State, territorial, or local *law creating special rights* or preference *for veterans*." Title VII Section 712 of the Civil Rights Act of 1964.

Does recognition of the constitutional right as stated in issue number one above; provide a *special right* (under Title VII section 712 of the Civil Rights Act of 1964) of exception to the exclusive judicial remedy inferred by the United States Supreme Court in *Brown v. General Services Administration* ?

The United States Supreme Court requirements of definiteness in the presentation and strict necessity in the determination of constitutional questions are satisfied. The adequacy of process presented as issue number two and the *Federal law creating special rights for veterans* presented as issue number three are both dependant upon the specific determination presented as issue number one. A negative response to any one of the three issues presented is fatal to this complaint of constitutional tort by appellee (hereafter Government).

The case law and facts present the rare instance when certification to the United States Supreme Court is advisable in the proper administration and expedition of judicial business as provided in *Wisniewski v. United States*, 77 S. Ct. 633 (1957). This appeal warrants certification based upon the following considerations:

A) The necessary determination of an inherent constitutional right which is "so rooted in the traditions and conscience of our people as to be ranked as fundamental" *Palko v. State of Connecticut, supra;*

B) The judicial conduct of the respective lower courts in denying that process which was constitutionally due. "No later hearing and no damage award can undo fact that arbitrary taking that was subject to right of procedural due process has already occurred." Fuentes v. Shevin, 92 S. Ct. 1983, 1995 (1972).

C) The conflict between the United States Supreme Court's **implied** restriction in *Brown v. General Services Administration, supra*, and the **explicit** exception provided by Congress under section 712 Title VII of the Civil Rights Act of 1964, as amended.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE:

Blough did initiate suit in district court alleging civil rights violations under Title VII of the Civil Rights Act of 1964, as amended (R1-10-1SR). Blough did motion the court to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR) and a claim of constitutional tort

against the Government (R1-10-97SR, 99SR, 104SR). The court ruled (R1-10-111SR) upon Government's motion for summary judgment denying Blough's Title VII complaint and Blough's motion to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR). The claim of constitutional rights violations which were put in issue in the amended complaint and the Government's response (R1-10-97SR, 99SR, 104SR) were neither involved nor adjudicated by the Order of the district court (R1-10-111SR).

Blough did appeal the decision by the district court (R1-10-111SR) to this court (case no. 99-13735-FF) in that the motions (R1-10-97SR, 99SR, 104SR) to amend the initial Complaint (R1-10-1) to include a claim of constitutional deprivation of a fundamental and protected liberty interest by Government were neither involved nor adjudicated by the Order of the district court (R1-10-111SR). Copies of Blough's pleadings to the Eleventh Circuit are located within the record excerpts to this appeal (Exhibit C). This court did not address the failure of the lower court to involve and adjudicate the claim of constitutional tort which was argued by Blough in his Brief, Reply Brief and Petition for Rehearing En Banc (R1-10-Exhibit B SR).

Blough filed a new action (R1-1) alleging the claim of constitutional rights violations which were previously raised in the initial proceedings (R1-10-1SR, 32SR, 97SR, 104SR, 107SR). The district court did grant Government's motion for summary judgment (R1-8) based upon the doctrine of *res judicata* (R1-11) and said Order is the subject of this appeal.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF PROCEDURAL DUE PROCESS VIOLATION PRESENTED AS ISSUES NUMBER ONE AND TWO:

Status of Blough providing for inherent constitutionally protected liberty interest:

Blough is one of approximately fifty-one thousand combat disabled veterans recognized as totally and permanently disabled by the Department of Veterans Affairs (source: Department of Veterans Affairs FY 1998 Annual Report). Blough has two artificial legs and loss of use of one hand as a result of service in Vietnam (R1-10-25SR). The United States Government has since 1970 accepted full responsibility and liability for the aforementioned status of Blough.

Blough has been employed by the United States Government/Department of the Treasury since 1979 as an Internal Revenue Agent (R1-10-25SR).

THE INITIAL CONPLAINT

The complaint as initially filed with the district court on June 29, 1998 did encompass a claim of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended (R1-1SR). The initial complaint did reference the physical disabilities of Blough, the threats of physical injury to Blough and the informal response/formal acceptance of said threats by the Government (Department of the Treasury and the Equal Employment Opportunity Commission).

The claim to violation of a protected Fifth Amendment liberty interest was asserted before the

court in the presence of Government's counsel at an early stage of the initial proceedings (R1-10-32SR page 17):

> "My basis for claim is that they violated my Fifth Amendment right to liberty. There's a tradition in this country, and you don't do certain things. And one of the things you don't do is you don't tell a disabled veteran with two artificial legs you are going to push him down a flight of stairs. You have taken away my sense of security. You don't have that right to do that. Nobody has that right."

Blough did file motions to amend the initial complaint (R1-10-1SR) under the provisions of Rule 15(a) of the Federal Rules of Civil Procedure to include violations under the Rehabilitation Act of 1973 (R1-10-33SR, 36SR, 49SR, 54SR, 106SR), and a claim of constitutional tort against Government (R1-10- 97SR, 104SR).

The following statements were presented in Blough's motion for leave to amend the initial complaint (R1-10- 97SR) under rule 15(a):

> "The essence of Plaintiff's initial complaint under Title VII is that he has been subject to a continuing series of threats, harassment, intimidation and retaliation as a pretext for adverse action over an eight year period. Said actions are also the basis in this Fifth Amendment claim."

Government's motion for summary judgment was taken under submission by the district court on

September 10, 1999. Briefs and affidavits of the parties were to be filed by said date.

A) On September 10, 1999 the court was in possession of Blough's motion to amend the initial complaint, memorandum of law in support of motion to amend the complaint, and the Government's motion in opposition to the motion to amend the complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR, 36SR, 49SR, 54SR, 106SR).

B) Prior to September 10, 1999 the court was in possession of Blough's motion to amend the initial complaint, memorandum of law in support of motion to amend the complaint, and the Government's motion in opposition to the motion to amend the complaint to include a claim of constitutional tort against Government (R1-10-97SR, 99SR, 104SR).

The district court did concurrently grant Government's motion for summary judgment in the complaints of Civil Rights and Rehabilitation Act violations (R1-10-111SR); however did abuse its power in that the court did not consider Blough's pleadings in response to the Government's motion for summary judgment (R1-10-107SR) and Blough's motion to amend the initial complaint to include a claim of constitutional tort by Government (R1-10-97SR, 99SR, 104SR). These conclusions are evident upon review of the Order of the district court (R1-10-111SR) and the supplement to the record currently before this court (R1-10):

A) The following statement is presented within the initial paragraph of the Order of the

district court(R1-10-111SR):

> "This cause comes before the Court on defendant's Motion for Summary Judgment (Doc. No. 75). Plaintiff has filed a response in opposition (Doc. No. 107)."

The following statements were presented in Blough's response to Government's motion for summary judgment (R1-10-107SR):

> "Two motions are pending before the Court to amend the initial Complaint of employment related discrimination under Title VII of the Civil Rights Act of 1964. The facts presented in this Complaint are so egregious such as to violate multiple statutes and the Constitution itself. It would be inappropriate for the Court to consider this motion for summary judgment which is limited to a single claim within a multi-facet Complaint.
>
> Upon completion of the amending process the Complaint will incorporate the following courses of action (claims) which utilize three different routes to reach the ultimate conclusion of discrimination. **The facts are consistent with each route; however the law and remedies differ** (emphasis added).
>
> 1. Deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution.

2. Unlawful intentional discrimination which is prohibited under Title VII, sections 704 and 717 of the Civil Rights Act of 1964, as amended.

3. Unlawful intentional discrimination which is prohibited under the Rehabilitation Act of 1973, as amended."

Conclusion: The district court did not review Blough's pleadings (R1-10-107SR) in response to Government's motion for summary judgment in that the Order of the district court (R1-10-111SR) does not reference the motion to amend for constitutional tort (R1-10-97SR, 99SR, 104SR) which was prominent in said pleadings.

Review of the Order of the district court (R1-10-111SR) in conjunction with Blough's response to Government's motion for summary judgment (R1-10-107SR) provides further evidence that the district court did not review Blough's pleadings. The Order misrepresents the pleadings of both parties, creates an absurd scenario and then ridicules Blough for proposing said scenario.

The following statement is also presented within the initial paragraph of the Order of the district court (R1-10-111SR):

"Plaintiff has also filed various papers which appear to be addressed to his Motion to Amend Complaint and/or his response to defendant's Motion for Summary Judgment. See Doc. 104 and 105."

Document 104 (R1-10-104SR) is a five page memorandum of law in support of Blough's motion the amend the initial complaint to include a claim of constitutional tort against the Government (R1-10-97SR) and was filed in response to the Government's motion in opposition to Blough's motion to so amend (R1-10-99SR).

Document 105 is a three page motion and memorandum of law requesting a trial by jury. The following comments are noted within said motion:

> "1. Although the 5th amendment claim was at the heart of the initial complaint, it was a difficult issue for pro se Plaintiff to frame.
>
> 2. The second motion to amend the initial complaint does contain an issue which is best addressed by a jury (i.e. deprivation of a fundamental and protected liberty interest which exists within the fifth amendment to the United States Constitution.
>
> 3. Defendant was apprised of this 5th amendment challenge upon consideration of the facts presented in the initial complaint, the preliminary injunction hearing, and during the deposition of Plaintiff by Defendant."

Conclusion: The district court did not review either Document No. 104 or Document No. 105 in that the Order of the district court (R1-10-111SR) does not reference the motion to amend for constitutional tort which was prominent in both documents.

A) The following statement is also presented within the initial paragraph of the Order of the district court (R1-10-111SR):

> "Also before the Court is plaintiff's Motion to Amend Complaint (Doc. No. 33) and defendant's response in opposition (Doc. No. 36)."

The Order was limited to the alleged violations under Title VII of the Civil Rights Act of 1964, as amended, (R1-10-1SR) and the motion to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR, 36SR, 49SR, 54SR, 106SR). The Order by the district court (R1-10-111SR) specifically states "Plaintiff's Motion to Amend Complaint (Doc. No. 33) is denied for the reasons set forth in this Order".

THE INITIAL APPEAL

On May 9, 2000 the appellate court "rubber stamped" (R1-10-Exhibit B SR) the decision of the district court denying the complaint of civil rights violations under Title VII of the Civil Rights Act of 1964, as amended (R1-10-1) and Blough's motion to amend the initial complaint to include violations under the Rehabilitation Act of 1973 (R1-10-33SR). The appellate court failed to provide comment relative to Blough's appeal of the district court's failure to address the motions to amend the initial complaint to include a claim of constitutional tort (R1-10-97SR, 99SR, 104SR).

THE CURRENT APPEAL

The Complaint of August 8, 2000 (R1-1) includes the following reference to the prior litigation:

> "The Court did fail to address the specific allegations of Constitutional rights violations which **were presented as an amendment** to the above referenced Complaint of civil rights violations. 'We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.' Washington v. Davis, 96 S. Ct. 2040 (1976). **This Court has not addressed the merits in the Complaint under the 'constitutional standards' required by the United States Supreme Court in** *Washington v. Davis, supra.*"

The district court did grant Government's motion for summary judgment (R1-8) based upon the doctrine of *res judicata* (R1-11) and Blough has appealed said decision to this court (R1-13). The district court's decision and Blough's appeal are based upon the following statement by the trail judge in the dispositive Order (R1- 11) and reflects upon a continuing abuse of power by the courts in the myopic view of the facts presented (R1-10) in Blough's asserted right to due process of law:

> "Moreover, as the Plaintiff has conceded, the claim he asserts in this case was always a part of the claim he asserted in the prior case. Even if it were not, it is manifestly clear from the record that the Plaintiff was well aware of the so-called constitutional tort claim based on the Fifth Amendment at the very inception of the earlier case and, therefore, **could easily have raised it in that case** (emphasis added)."

ARGUMENT AND CITATIONS OF AUTHORITY RELATIVE TO PROCEDURAL DUE PROCESS VIOLATION PRESENTED AS ISSUES NUMBER ONE AND TWO:

Based upon the standards established by the United States Supreme Court in Washington v. Glucksberg 117 S. Ct. 2258, 2269 (1997), Blough has a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the same government which put him in harms way in Vietnam.

The constitutional violations of Blough's rights by the United States Government were invidious in nature and so unjustifiable as to be violative of due process under United States v. Gilman, 74 S. Ct. 695 (1954) and subject to challenge under Washington v. Davis, 96 S. Ct. 2040 (1996).

The first time Blough felt handicapped after Vietnam was when Group Manager Prowler put his fist in Blough's face and backed him against those file cabinets. He took something special away from Blough that day and in doing so violated Blough's inherent Fifth Amendment right to be free from unjustified intrusions on personal security. Ingraham v. Wright, 97 S. Ct. 1401, 1413 (1977). The continuing threats of physical injury, the Government's written response that said threats were not carried out and therefore no process was due Blough, the continuing harassment and retaliation over a nine year period were all supported by extensive documentation and third-party testimony obtained during the discovery phase of the initial complaint and were presented to the respective courts (R1-10-32SR, 107SR). Based upon the federal employment benefits extended to disabled veterans by

Congress and the national obligation to totally and permanently disabled veterans, Blough's expectation of process was justified and did rise to the level of a constitutionally protected liberty interest.

The district court and the appellate court did, on three occasions prior to this appeal, fail to read Blough's amended complaint of constitutional tort and the Government's response (R1-10-1SR, 32SR, 97SR, 99SR, 104SR, 107SR). This complaint now revolves around questions of law and the conduct of the respective courts as opposed to the facts reflecting upon the violations of Blough's Fifth Amendment liberty interest by the Government. "Unfortunately, this is another instance of judicial haste which in the long run makes waste.'" Estelle v. Gamble, 97 S. Ct. 285, 295 (1976) (citing Dioguardi v. Durning, 139 F.2d 774 (C.A.2, 1944)).

The claim of constitutional tort was raised by the following statement in open court and brought no response from the court or the Government - "My basis for claim is that they violated my Fifth Amendment right to liberty" (R1-10-32SR page 17). In the initial litigation the courts and the Government were also advised of the claim of constitutional tort which was subsumed in the initial complaint filed under Title VII of the Civil Rights Act of 1964 (R1-10-1SR), requested by motion to amend which was properly filed with the court (R1-10-97SR, 99SR, 104SR) and referenced in Blough's response to Government's motion for summary judgment (R1-10-107SR). The issues proposed by the amended claim of constitutional tort (R1-10-1SR, 32SR, 97SR, 99SR, 104SR, 107SR) were legal and required no additional discovery to posture them for adjudication. The cause of action arose under a different law by the amendment, but the facts constituting the tort were the same, whichever law gave them that effect, and

there was no surprise to the Government in said amendment.

The appellate court did not apply the required de novo standard of review to the Order of the district court (R1-10-111SR) and the facts within the court record (R1-10). This was an intentional abuse of power by the court in that the required procedural due process and the inseparable inherent fundamental constitutional right were both ignored by the court.

Government's motion for summary judgment in the current litigation (R1-8) is correct in that A) the initial complaint of civil rights violations (R1-10-1SR); B) the motion to amend said initial complaint to include a claim of constitutional tort (R1-10-97SR, 99SR, 104SR); and C) the complaint of constitutional tort before this court (R1-1) involve the same parties and the same nucleus of operative fact; however the Government is incorrect in that the initial court did not involve and the Order of said court (R1-10-111SR) did not adjudicate the motion to amend the initial civil rights complaint to include a claim of constitutional tort (R1-10-1SR, 32SR, 97SR, 104SR, 107SR). A final judgment on the merits of the claim of constitutional rights violations has not been rendered by a court of competent jurisdiction as required by Southern Pacific R. Co. v. United States, 18 S. Ct. at 27 (1897).

The statement within the district court Order under appeal (R1-11) that Blough **could easily have raised it (constitutional tort claim) in that (earlier) case** was an intentional abuse of power in the denial of procedural due process. The court made no effort to read the facts presented in Blough's pleadings (R1-10). It is abundantly clear from the pleadings and factual record before that court and this court (R1-10) that the claim of constitutional tort and the Government's opposition were distinctly put in issue

during the course of the initial litigation (R1-10-1SR, 32SR, 97SR, 99SR, 104SR, 107SR), the court in the initial litigation did not involve and the Order of the court (R1-10-111SR) did not adjudicate the motion to amend the initial complaint to include a claim of constitutional tort.

The decisions in Montana v. United States, 99 S. Ct. 970 (1979) and Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235 (11th Cir. 1999) were based upon the premise, **before any other considerations**, that the relevant party has "**had a full and fair opportunity to litigate**". The United States Supreme Court has repeatedly recognized the absolute necessity that the party against whom the earlier decision is asserted must have been afforded a **full and fair opportunity to litigate** that issue in the earlier case. Allen v. McCurry, 101 S. Ct. 411, 415 (1980). The *opportunity* to be heard is a fundamental requirement of procedural due process. Grannis v. Ordean, 34 S. Ct. 779, 783; Armstrong v. Manzo, 85 S. Ct. 1187, 1191 (1965); Boddie v. Connecticut, 91 S. Ct. 780, 784 (1971). Blough **was denied a full and fair opportunity to litigate** in the earlier case and therefore the doctrine of res judicata does not apply to the current litigation (R1-11).

ARGUMENT AND CITATIONS OF AUTHORITY RELATIVE TO SUBSTANTIVE DUE PROCESS VIOLATIONS PRESENTED AS ISSUES NUMBER ONE AND THREE:

The Federal question presented as issues number one and three are purely questions of law and are essential to this complaint of substantive and procedural due process violations.

The Federal Government has engaged in preferential hiring of veterans through official policies

and various special laws since the Civil War. Personnel Adm'r of Massachusetts v. Feeney, 99 S. Ct. 2282 (1979). The protection afforded the special rights and preferences for veterans under section 712 of Title VII of the Civil Rights Act of 1964 from constitutional challenge was recognized by the Supreme Court in Personnel Adm'r of Massachusetts v. Feeney, at 2286.

Government relies (R1-8- page7) upon the United States Supreme Court's determination that **section 717** of Title VII of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment, Brown v. General Services Administration, 96 S. Ct. at 1969, and therefore; Blough has no legal basis to complain of violations under the Fifth Amendment to the United States Constitution. The Government did also claim the limitations of *Brown v. General Services Administration* in Government's motion (R1-10-99SR) in opposition to Blough's motion to amend the initial complaint to include a claim of constitutional tort (R1-10-97SR).

Section 712 of Title VII of the Civil Rights Act of 1964, as originally passed by Congress, does provide an important exception to the judicial restrictions of section 717 as recognized by the Supreme Court in Brown v. General Administration, 96 S. Ct. at 1969. Reliance by the Government on *Brown v. General Service Administration* is misplaced based upon the express provision of Congress under section 712 of Title VII of the Civil Rights Act of 1964 that "**nothing contained in this title shall be construed to repeal or modify any Federal ..... law creating special rights ... for veterans**" and the findings by the United States Supreme Court that discrimination by the United States Government may be so unfair as to violate Fifth Amendment rights. Blough did make

this argument in the motion to amend the initial complaint to include a claim of constitutional tort (R1-10-104SR), in the initial appeal to the United States Court of Appeals for the Eleventh Circuit (Exhibit C record excerpts to this appeal), and in response to Government's motion for summary judgment (R1-10) in the current litigation.

Federal employment discrimination clearly violated the Constitution before the passage of the 1972 Act. Brown v. General Services Administration, at 1964 (Citing Bolling v. Sharpe, 74 S. Ct. 695 (1954)). Section 712 of Title VII did originate under the 1964 Civil Rights Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes". Brown v. General Services Administration, 96 S. Ct. at 1968. Section 717 of Title VII of the 1964 Civil Rights Act, as amended, leaves undisturbed whatever remedies Blough might otherwise possess. Davis v. Passman, 99 S. Ct. 2264, 2278 (1979). As in the case of Brooks v. United States, 69 S. Ct. 918 (1949), it would be absurd to believe congress did not have the Constitutional rights of veterans in mind when they passed section 712 Title VII of the Civil Rights Act of 1964 and a reading of the entire Act reflects upon such an objective and policy. Blough is therefore permitted to pursue his rights under both Title VII of the Civil Rights Act of 1964, as amended, and any other law creating a special right as a totally and permanently disabled veteran.

The section 717 Title VII restriction on remedy was **inferred** by the United States Supreme Court in *Brown v. General Service Administration*; however the language of section 712 Title VII is **explicit** and has remained **unchanged** since Congressional enactment.

No provision of Title VII of the Civil Rights Act of 1964, as amended, may restrict the inherent constitutional rights of totally and permanently disabled veterans who have been recognized as entitled to the constitutional right presented as issue number one. The courts, not legislative bodies, are charged with the duty to interpret the legitimate rights of said veterans under the Constitution of the United States. The fact said veterans are employees of the United States Government does not deprive them, but rather bestows upon them a justified expectation of process in a constitutionally protected liberty interest.

CONCLUSION

This is a complaint of constitutional tort for actions by the United States Government which were egregious and continuous in nature. Said actions were the direct result of an abusive institutional environment within the United States Department of the Treasury and the respective Federal courts; which did promote and fail to provide a venue for relief from said actions.

The record clearly indicates that Blough did raise the claim of constitutional tort based on the Fifth Amendment in the prior litigation (R1-10-1SR, 32SR, 97SR, 99SR, 104SR, 107SR) . The purpose in Rule 15(a) of the Federal Rules of Civil Procedure is to afford the injured party the full and fair opportunity to be heard. The intentional abuse of power by the respective Courts in the denial of Blough's right to a "full and fair opportunity to litigate" the alleged constitutional rights violations in the prior litigation and the current litigation is reflective of a system which is overwhelmed and frustrated. The frustration within said system is directed to the perceived cause of the problem and those least able to defend (i.e. the pro se litigant). Pro se litigants have one and only

one characteristic in common ---- they believe the Federal courts will treat them fairly.

The questions of law revolving about the asserted constitutional rights are worthy of review by the United States Supreme Court based upon consideration of the Supreme Court's decision in *Brown v. General Services Administration, supra,*. 96 S. Ct. at 1968. Based upon the facts specific to this complaint, there is an obvious conflict between the Supreme Courts **implied** judicial restrictions associated with actions under section 717 and the **explicit** exception provided under section 712 of Title VII of the Civil Rights Act of 1964, as amended. The conflict within the statute requires resolution by the United States Supreme Court.

WHEREFORE, Blough respectfully requests that this court certify to the United States Supreme Court to resolve these questions of law which are of national significance in addressing the constitutional obligation of the American people to provide and protect the inherent Fifth Amendment rights of totally and permanently disabled veterans.

Respectfully submitted under penalty of perjury this twenty-third day of February, 2001.

"S/Melvin E. Blough" pro se
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Susan H. Rothstein-Youakim (Suite 3200, 400 North Tampa Street, Tampa, FL. 33602) this twenty-third day of February, 2001.

"S/Melvin E. Blough" pro se